Supreme Court, U.S.
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91-1755

No. _____

In The

Supreme Court of the United States

October Term, 1991

DENNIS MURDOCK and SHARON MURDOCK, for themselves and as parents and next friends of their minor child, SHAWN M. MURDOCK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

WESTERN CONTRACTING CORPORATION

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the en banc opinion of the United States Court of Appeals for the Eighth Circuit has interpreted and applied Nebraska law on workplace safety, in a manner contrary to the most recent opinion of the Nebraska Supreme Court on that subject, and whether questions of state law should be certified to the Nebraska Supreme Court for consideration in light of its most recent opinion on that subject?

2. Whether the en banc opinion of the United States Court of Appeals for the Eighth Circuit sets an unfair precedent for Federal Tort Claims Act Plaintiffs by applying a "clearly erroneous" rather than a "de novo" standard of review in a case dismissed, in large part, because federal employees were held by the district court to have "discretion" to ignore explicit, mandatory, safety regulations which their job descriptions required them to enforce?

3. Whether federal employees who knowingly depart from assigned, mandatory, safety responsibilities are "negligent" as a matter of federal common law, regardless of their personal belief that they were acting with due care?

PARTIES TO PROCEEDING

In accordance with S. Ct. Rule 14.1(b), the parties to the proceeding in the United States Court of Appeals for the Eighth Circuit, whose judgment is sought to be reviewed herein, are as follows:

Petitioners: Dennis Murdock and Sharon Murdock, for themselves as parents and next friends of their minor child, Shawn M. Murdock.

Respondents: The United States of America and Western Contracting Corporation.

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The en banc opinion of the United States Court of Appeals for the Eighth Circuit dated December 18, 1991, whose judgment herein is sought to be reviewed, is unreported but is reprinted in the separate Appendix to this Petition, App. A, p. A-1. The prior panel opinion of the United States Court of Appeals for the Eighth Circuit, also reprinted in the separate Appendix, App. B, p. B-1, is reported in 917 F.2d 1065 (8th Cir. 1990).[1] The opinion of the District Court for the District of Nebraska on the plaintiffs'-petitioners' Motion for Partial Summary Judgment and defendant-respondent and third party plaintiff's Motion for Partial Summary Judgment is unreported but a copy is reprinted in Appendix C, p. C-1. The opinion of the District Court for the District of Nebraska after trial entitled Memorandum of Decision is unreported, but a copy of said decision is reprinted in Appendix D, p. D-1. A copy of the Judgment is reprinted in Appendix E, p. E-1.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit, en banc, was entered on December 18, 1991. A

[1] The caption of this case, as printed in the reporter, is in error. Employers Insurance of Wausau was named in the district court because of its Workers' Compensation subrogation interest. After trial it did not join in the appeal, and if it had it would have been an Appellant along with the Murdocks. Employers should not have been included in the caption of this case on appeal, and the opinion should have been captioned and reported as: *Murdock v. United States*, 917 F.2d 1065 (8th Cir. 1990).

timely petition for rehearing with Suggestion for Rehearing En Banc and Certification to the Nebraska Supreme Court was denied on February 3, 1992. See, Appendix F, p. F-1. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

This case involves the interpretation of 28 U.S.C. Section 2680(a) which exempts the applicability of the Federal Tort Claims Act to:

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

STATEMENT OF THE CASE

Western Contracting Corporation contracted with the United States, through the Bureau of Reclamation, to build the Mirdan Canal near Burwell, Nebraska, and employed Dennis Murdock as part of its night shift crew. On June 12, 1985, Murdock was working in a deep excavation, using a gas-powered, hand-held, dirt compactor to compact loose, sandy soil under an overhanging concrete canal lining, which he thought was reinforced with

steel and incapable of collapse, when suddenly and without warning, it fell. Murdock was buried by concrete and sand, and pressed against the hot compactor, with resultant serious bodily injury. Murdock, his wife, and infant son filed suit against the United States, which owned the land where the project was being constructed, under the Federal Tort Claims Act, 28 U.S.C. Section 2671 (1988), on the theory that the Bureau negligently failed to take adequate precautions to ensure a safe place to work. The United States filed a third-party complaint against Western Contracting Corporation for contribution or indemnity, alleging that Western's negligence was a proximate cause of the canal's collapse.

The basis of federal jurisdiction for the case in the District Court for the District of Nebraska was based on 28 U.S.C. Section 1331 and 1346(b) insofar as it was an action against the United States arising under the Federal Tort Claims Act, 28 U.S.C. Section 2671, et seq.

REASONS FOR GRANTING THE WRIT

ARGUMENT I

THE EN BANC OPINION IS CONTRARY TO A RECENTLY RELEASED NEBRASKA SUPREME COURT DECISION, (WHICH INTERVENED BETWEEN THE ARGUMENT AND DECISION IN THIS CASE), HOLDING THAT THE POSSESSOR OF REAL ESTATE HAS A NONDELEGABLE DUTY TO PROVIDE A SAFE PLACE TO WORK FOR A CONTRACTOR'S EMPLOYEES WORKING ON THE PREMISES, IRRESPECTIVE OF THE DEGREE OF CONTROL OVER THE WORK EXERCISED BY SUCH POSSESSOR.

A long-standing reason for considering whether to grant a rehearing of an appeal is that an intervening

opinion of a state's high court, addressing a point of state law involved in the appeal, has become available. *See, e.g., Osborne v. Adams County*, 109 U.S. 1 (1883). *See also*, 2 Fed. Proc., L.Ed.2d ¶ 3:738 (1981).

Between the date this case was argued and submitted en banc, February 1, 1991, and the date the en banc opinion was filed, December 18, 1991, the Nebraska Supreme Court decided the case of *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), which is contrary to the district court's primary reason for finding that the United States owed no "duty" to Murdock under Nebraska law.

The majority en banc opinion noted that the district court had determined that any duty of the United States, as the owner of real estate whereon dangerous work was being performed, to provide Murdock with a safe place to work, was to be " . . . answered by determining who had control over the work." (App. A, p. A-3).

The primary and central basis for the district court's dismissal of Murdock's complaint was that the government had not exercised sufficient control over the work to give rise to a "duty" to Murdock. (App. D, p. D-9). The primary and central basis for the Eighth Circuit Court of Appeal's affirmance was that the district court's findings on the issue of "control" was not "clearly erroneous." (App. A, p. A-10).

However, in *Plock v. Crossroads Joint Venture, supra*, (decided October 4, 1991), the Nebraska Supreme Court specifically addressed the question of whether the owner of premises, who reserves some rights thereto, is a "possessor" of the reality chargeable with a nondelegable

duty "to keep the premises safe for invitees." 239 Neb. at 227-228, 475 N.W.2d at 117.

It may seem strange, but the *Plock* opinion recognizes that under Nebraska law a nondelegable duty for safety devolves upon not only a so-called "owner in control" of a potentially dangerous workplace, but also upon an owner who merely reserves "certain rights" as to the premises, and is therefore a "possessor" of the real estate as enunciated in Restatement (Second) of Torts § 343 (1965). *Id.*

The Nebraska Supreme Court reaffirmed the principle recognized in the case of *Simon v. Omaha P.P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972), that an "owner in control" of premises, whereon dangerous work is being done is charged with a nondelegable duty to provide workers thereon a safe place to work. More importantly, however, the Nebraska Supreme Court also held that an owner who merely reserves some rights to the premises is a "possessor" of the real estate having a nondelegable duty to take "suitable precautions" to protect any invitees thereon from dangerous conditions. 239 Neb. at 227-228, 475 N.W.2d at 117.

The contractual rights reserved by the owner of the premises in *Plock* were far less extensive than the contractual rights reserved by the Bureau in this case. In *Plock*, it was noted that the owner of the premises had " . . . no procedure for on-site inspections, identifying safety problems, or supervising . . . " the contractor's work. 239 Neb. at 214, 475 N.W.2d at 110. The landowner in *Plock* merely " . . . retained the right to make certain decisions regarding rental terms, selecting of tenants, dealing with taxes

and insurance, and similar actions. . . . " 239 Neb. at 215, 475 N.W.2d at 110. In this case, the district court found: "The contract also makes clear that the government retained the right to inspect the contractors work. . . . " (App. D, p. D-3-4). It is also clear from the evidence that the Bureau maintained a large inspection staff for daily inspections.

Accordingly, while the Bureau in this case clearly undertook an even greater responsibility for safety inspections, than did the landowner in *Simon*[2], and under Nebraska law should have been found to be an "owner in control," it is most certainly, under the undisputed evidence in this case, a "possessor" of real estate chargeable with a nondelegable duty as to potentially dangerous conditions upon its premises, under the law set forth in *Plock*.

In *Plock* the Nebraska Supreme Court said:

> . . . a possessor of land is subject to liability for physical harm caused to invitees on its land if the possessor knows that a condition involves an unreasonable risk of harm, the possessor should expect that the invitees will not discover the danger or protect themselves against it, and the possessor fails to exercise reasonable care to protect against such dangers.

239 Neb. at 228, 475 N.W.2d at 117.

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[2] In *Simon*, safety inspections were made only twice a day, rather than continuously, as in this case. 189 Neb. at 187, 202 N.W.2d at 161.

The Nebraska Supreme Court also noted that under its view of Restatement (Second) of Torts § 343 A (1965), " . . . the possessor of land may be liable to an invitee having knowledge of the condition if the possessor should anticipate harm despite such knowledge on the part of the invitee . . . " 239 Neb. at 228-229, 475 N.W.2d at 117.

Of course, there is also language in *Plock* which could be a possible basis for upholding the dismissal of this action because of the "exclusive remedy" provisions of the Nebraska Workers Compensation Act. However, the "exclusive remedy" provision has not been raised or argued in this case. Even if it could be, fairness would dictate that Petitioners-Appellants be allowed to respond.

Obviously, this case, in part, depends upon the proper application of Nebraska law regarding a landowner's nondelegable duty to provide a safe place to work for worker-invitees on the premises. The district court acknowledged some difficulty in ascertaining the exact nature of such a duty under Nebraska law. (App. C, p. C-9). In addition, the actual impact of the *Plock* decision upon the facts of this case is in some respects confusing. Accordingly, it is suggested that this would be a proper case for certification of pertinent questions to the Nebraska Supreme Court for clarification, under NEB. REV. STAT. § 24-219, et seq. (Reissue of 1989), a copy of which can be found in Appendix G, which request was denied by the United States Court of Appeals for the Eighth Circuit. See, App. F, p. F-1.

To summarize: (1) The district court determined that whether the government owed Murdock a nondelegable

duty of protection depended primarily upon the degree of control it exercised over the project, rather than the nature of the dangerous condition existing upon its property. (2) The United States Court of Appeals for the Eighth Circuit accepted the district court's view of Nebraska law as not being clearly erroneous. (3) The Nebraska Supreme Court, in an opinion which intervened between the submission of this appeal en banc and the time the en banc decision was filed, ruled that "control" by a landowner over work being done on this property is not alone determinative of the existence of a nondelegable duty to protect worker-invitees on the premises, and such a duty can arise irrespective of the degree of control exercised by the landowner, if a condition exists on the property "involving an unreasonable risk of harm" to such workers. (4) The aforesaid Nebraska Supreme Court opinion is, however, sufficiently unclear in its impact upon the particular facts of this case as to justify certification of certain crucial questions in this case to the Nebraska Supreme Court, pursuant to NEB. REV. STAT. § 24-219, et seq. (Reissue of 1989), which request the United States Court of Appeals for the Eighth Circuit denied.

ARGUMENT II

THE EN BANC OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT SETS AN UNFAIR PRECEDENT FOR FEDERAL TORT CLAIMS ACT PLAINTIFFS BY APPLYING A "CLEARLY ERRONEOUS" RATHER THAN A "DE NOVO" STANDARD OF REVIEW IN A CASE DISMISSED, IN LARGE PART, BECAUSE FEDERAL EMPLOYEES WERE FOUND BY THE DISTRICT COURT TO HAVE "DISCRETION" TO DISREGARD MANDATORY SAFETY REGULATIONS WHICH THEIR SPECIFIC JOB DESCRIPTIONS REQUIRED THEM TO ENFORCE.

The district court in ruling upon the respective motions for summary judgment of the parties, found that the discretionary function exception did not protect the United States from suit in this case. (App. C, p. C-16). The district court's conclusion rested upon the fact that Richard Schwisow, one of the government inspectors who viewed the excavation at issue before it caved-in upon Murdock, had observed that it was not properly excavated. The district court then noted that the said inspector's job description states that he "[s]upervises on-site safety program involving both the Bureau and contractor's operation. Assures that the inspection forces are properly advised and all unsafe conditions or practices are corrected immediately." (*Id.*) Since the inspector's job description was in explicit, mandatory language the district court concluded that under this Court's decision in *McMichael v. United States*, 856 F.2d 1026 (8th Cir. 1988), the discretionary function exception did not apply. (*Id.*)

However, after trial the district court found that the Bureau's inspectors did have discretion to take no action

regarding the excavation. (App. D, p. D-11). This finding was made by the district court despite the aforesaid Inspector's admission that he knew that "portions" of the excavation did not comply with the Bureau's mandatory Construction Safety Standards.

In so ruling, the district court relied upon the testimony of C. Alvin Currie, the Bureau's Project Safety Manager. The district court noted that Mr. Currie " . . . testified that Sintek and Schwisow had the power to stop the work of the contractor's employees, provided the violations of the construction safety standards were sufficiently severe and that the decision to do so was left to the inspector's discretion." (App. D, p. D-11).

Since the Bureau's inspectors saw no workers in "imminent danger" during their observations, and stated they did not know the night crew would be in the excavation that night, the district court found that they had " . . . exercised reasonable precautions in the performance of their duties regarding the excavation." (App. D, p. D-11-12).

If then, the district court found that the inspectors had "discretion" to stop work only if they observed violations of construction safety standards which were "sufficiently severe," and further found that they had "exercised reasonable precautions" so that liability did not attach to the government because of their conduct, doesn't it logically follow that the district court held that the government was not liable because the government's inspectors had performed a "discretionary function?"

Affirmance of the district court sets an unfair and dangerous precedent for future Federal Tort Claims Act (hereinafter FTCA) plaintiffs. In this case, the district court has managed to avoid the import of the United States Supreme Court decision in *Berkovitz v. United States*, 486 U.S. 531 (1989), which held that the failure of federal employees to perform mandatory job duties vitiates the discretionary function exception to the FTCA.

Of course, the district court recognized that the United States could not hide behind the discretionary function exception to the FTCA, since its employees failed to perform mandatory safety duties imposed upon them by the Bureau. However, the district court then dismissed the case finding that those same employees had discretion to either enforce or not enforce applicable safety standards, depending upon their personal view of the "severity" of the safety violations. Under this reasoning the intent and purpose of *Berkovitz* is rendered impotent.

Dismissal of this case based upon a finding that the Bureau's inspectors had the discretion to do nothing to correct the improper excavation they observed, means that the proper standard for review of this appeal is "de novo", rather than "clearly erroneous" as applied in the Eighth Circuit's opinions. It is well established that "[a]n appellate court reviews *de novo* the dismissal of a case under the discretionary function exception." *Hurst v. United States*, 882 F.2d 306 (8th Cir. 1989). The case should be reviewed pursuant to the proper standard.

ARGUMENT III

FEDERAL EMPLOYEES WHO KNOWINGLY DEPART FROM ASSIGNED MANDATORY SAFETY RESPONSIBILITIES ARE "NEGLIGENT" AS A MATTER OF FEDERAL COMMON LAW, REGARDLESS OF THEIR PERSONAL BELIEF THAT THEY ACTED WITH DUE CARE.

The case of *Berkovitz v. United States*, 486 U.S. 531 (1989), not only clarified the discretionary function exception to the FTCA, it also created federal common law regarding the meaning of negligence under the FTCA.

In ruling on the motions for summary judgment of the parties hereto, the district court concluded that because the Bureau's inspectors were enjoined with explicit and mandatory job responsibilities for project safety, and had observed an excavation which was not in compliance with the project's construction safety standards, but did not stop work thereon, the discretionary function exception to the FTCA did not appy in this case. (App. C, p. C-15-16). (Of course, as previously noted, the district court after trial concluded that the decision of the Bureau's inspectors not to stop or prevent further work in the excavation was not negligent, and constituted a proper exercise of their discretion under the circumstances.)

After ruling that the discretionary funcion exception to the FTCA did not protect the decision of the Bureau's inspector to not stop or prevent work in the excavation, the district court stated: " . . . the next issue that must be decided is whether Schwisow's failure to follow the duty that was imposed upon him as an employeeof the Bureau constitutes negligence." (App. C, p. C-16). In framing the

issue thusly, the district court was misled into ignoring the obvious. If, as the district court said, Schwisow had a job duty imposed upon him by his employer, and if he failed to "follow the duty", as noted by the district court, doesn't simple logic dictate that he was "negligent." After all, negligence is generally defined, not just in Nebraska but elsewhere, in the following manner:

> Negligence is doing something that a reasonably careful person would not do under similar circumstances, or failing to do something that a reasonably careful person would do under similar circumstances.

N.J.I.2d 3.02.

However, instead of finding that Schwisow's admitted failure to perform his job responsibilities, as would a careful person, was clear evidence of negligence, the district court instead moved from the legalistic and objective standard of negligence, (i.e., did Schwisow violate his mandatory job assignment), to a wholly discretionary and subjective standard of negligence, (i.e., did he feel the excavation was "unsafe"). (App. C, p. C-16). In this regard, the district court stated as follows:

> . . . Although Schwisow's report indicates that he believed the trench workers' activities to be problematic, it is unclear whether he also felt that the activities were unsafe and there is a genuine question of fact whether the excavation at that time was unsafe. (*Id.*)

Why, if the excavation was not in compliance with the Bureau's own Construction Safety Standards as admitted by Schwisow, does it matter how he "felt?"

Why, if the Bureau adopted Construction Safety Standards, which were designed and intended to "promote working conditions and work practices which will ensure all employees a safe and healthful work environment" and required its inspectors to enforce them as to its contractors when violations were observed, does it matter whether the inspector believed the excavation did not present an "imminent danger" to anyone, or appear immediately unsafe, at the time of his inspection?

The United States Supreme Court in a recent case under the FTCA has rejected application of a subjective standard for evaluating a federal employee's conduct, even when the employee is allowed some discretion. In *United States v. Gaubert*, 111 S. Ct. 1267 (1991), the Court said: "The focus of inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." 111 S. Ct. at 1274.

Since, Schwisow's job description, was mandatory, (requiring him to "assure" safety), and the Bureau's Construction Safety Standards, which he was supposed to enforce, were written in mandatory language, there was no reason for the district court to consider his "subjective intent" in failing to stop work or otherwise prevent workers from entering the excavation on foot. If he knew, as he said he did, that the excavation did not comply in all respects to the Construction Safety Standards, he was "objectively" negligent for failing to require compliance. As the United States Supreme Court said in *Gaubert, supra*:

> . . . If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy.

111 S. Ct. at 1274.

Analyzed in this way, there should be governmental liability irrespective of state law. The Bureau's duty to Murdock arose simply because it voluntarily undertook to mandatorily require its employees to "assure" workplace safety, by enforcing its mandatory Construction Safety Standards. This assumed duty is in addition to, and redundant of, any other workplace safety duties imposed upon it by state law as a result of its retention of control of the project, or permitting an inherently dangerous condition to go unguarded upon its premises.

Since from an objective standpoint, the Bureau's inspectors observed an excavation which did not comply with the Construction Safety Standards, as they admitted, and they did nothing to require compliance or prevent people from entering the excavation on foot, as they admitted, they were negligent. The United States should be liable for the proximate result of their negligence, as a matter of federal common law, unless Murdock, by comparison, was more than slightly negligent under state law. A fair reading of both *Berkovitz* and *Gaubert, supra,* supports this analysis.[3]

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[3] In addition to the evolution of federal common law on this subject, under *Berkovitz* and *Gaubert, supra,* the violation of a mandatory safety regulation is clear "evidence of negligence" under Nebraska law. *Simon v. Omaha P.P. Dist.*, 189 Neb. 183, 195-196, 202 N.W.2d 157, 165-166 (1972).

Finding that Schwisow's disregard of mandatory, governmental, safety standards, which he was charged with enforcing, constitutes an act of negligence makes sense, since the concept of "foreseeability of risk of harm" is already built into the Bureau's Construction Safety Standards. It is precisely because departures from the standards can lead to death or serious injury that they have been made mandatory. Regardless of whether Schwisow foresaw the precise time, mechanics of occurrence, or category of persons who could be injured, or believed he was acting with due care, he was from a purely objective standpoint – negligent! To so hold is a logical extension of the reasoning of the United States Supreme Court in *Berkovitz v. United States*, 486 U.S. 531 (1989).

CONCLUSION

For the reasons stated above, Petitioners, Dennis Murdock and Sharon Murdock, for themselves and as parents and next friends of their minor child, Shawn M. Murdock, respectfully request this Honorable court to grant their Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 89-2303

Dennis Murdock and Sharon Murdock, for themselves and as parents and next friends of their minor child, Shawn M. Murdock,	*	
Appellants,	*	Appeal from the United States District Court for the District of Nebraska.
Employers Insurance of Wausau, a Corporation,	*	
v.	*	
United States of America,	*	
Appellee,	*	
Western Contracting Corporation,	*	
Appellee.	*	

Submitted: February 1, 1991

Filed: December 18, 1991

Before LAY, Chief Judge, HEANEY, Senior Circuit Judge, and MCMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM and LOKEN, Circuit Judges, *En Banc*.

JOHN R. GIBSON, Circuit Judge.

Western Contracting Corporation contracted with the United States, through the Bureau of Reclamation, to build the Mirdan Canal near Burwell, Nebraska, and employed Dennis Murdock as part of its night-shift crew. On June 12, 1985, Murdock was using a hand-held mechanical dirt compactor, or "Whacker-Packer", to build soil around a concrete canal lining in a bridge abutment excavation. A portion of the canal lining wall collapsed, Murdock was buried, and he suffered serious injuries. Murdock and his family sued the United States, which owns the land were Murdock was working, under the Federal Tort Claims Act, 18 U.S.C. § 2671 (1988), claiming that the United States negligently failed to take adequate precautions to ensure a safe place to work.[1] The district court[2] entered judgment for the United States, holding that the Bureau did not owe a duty to provide Murdock a safe place to work under Nebraska law, and that even if such a duty existed, the Bureau was not negligent and Murdock was contributorily negligent. *Murdock v. United States*, CV86-L-492, slip op. at 6-8 (D. Neb. Mar. 15, 1989).

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[1] The United States filed a third-party complaint against Western Contracting seeking contribution and indemnity for Western's negligence in causing the accident.

[2] The Honorable Warren K. Urbom, United States District Judge for the District of Nebraska.

A panel of this court reversed. *Murdock v. United States*, 917 F.2d 1065 (8th Cir. 1990), and we granted rehearing en banc. We conclude that the district court correctly denied relief under Nebraska law, and that its decision denying relief after trial was based on facts which are not clearly erroneous. We affirm the district court's judgment.

The facts of this case are set forth in the panel opinion, 917 F.2d at 1066-69, and will be repeated here only as necessary to address the arguments on appeal.

The general rule in Nebraska is that an owner is not liable for the negligence of an independent contractor. *Sullivan v. George A. Hormel & Co.*, 208 Neb. 262, 303 N.W.2d 476, 478 (1981). This rule is subject to three exceptions. The owner is liable for the negligence of the independent contractor if: (1) the employer retains control of the work; (2) Nebraska common law creates a nondelegable duty; or (3) Nebraska statutes create a nondelegable duty. *Erickson v. Monarch Indus.*, 216 Neb. 875, 347 N.W.2d 99, 105 (1984).

After extensive discovery, Murdock and the United States filed motions for summary judgment. The district court first considered whether the Bureau had a nondelegable duty under Nebraska case law to provide Murdock with a safe place to work. The court rejected Murdock's claim that the Bureau owed a duty to provide Murdock with a safe place to work because it owned the land where the accident occurred. *Murdock v. United States*, No. CV86-L-492, slip op. at 8 (D. Neb. Nov. 30, 1988). The court concluded that the Bureau may still have a duty under Nebraska case law, however, because an

owner who is responsible for a dangerous place or operation likely to cause injury has a nondelegable duty to take due and suitable precautions. *Id.* at 9. The district court considered whether the government had such a duty under Nebraska Law, and concluded that the duty to provide a safe place to work "rests with the party upon whom the duty devolved." *Id.* at 10. The court reasoned that the question is answered by determining who had control over the work, and therefore, the first two exceptions to Nebraska's non-liability rule were "inextricably combined." *Id.* at 9.

In determining whether Western retained control over the project, the court observed that the contract between Western and the Bureau included safety standards, that the Bureau retained the right to perform inspections for violations of safety standards, and did conduct inspections. *Id.* at 13. The court also observed that the decision to remove a portion of the curb above the excavations was based on the advice of Robert McClure, the Bureau's Project Construction Engineer, and that a government inspector, Richard Schwisow, was at the site on the day of the accident, saw that there was a problem with the excavation, but told no one about it. *Id.* The court also noted that the Bureau did not perform the excavation work, and that Western had the primary responsibility for worker safety. *Id.* Although terming the decision "difficult," the court concluded that the Bureau retained sufficient control over the project to justify the imposition of a duty to provide Murdock with a safe place to work. *Id.* at 14.

Following an eight-day trial, the district court entered judgment for the government. The court first

held that, after considering all of the evidence, the Bureau did not retain sufficient control to justify imposing a duty under Nebraska law. *Murdock*, slip op. at 6 (Mar. 15, 1989). The district court found that the trial testimony established that the level of control exercised by the government's agents was "markedly lower" than that in *McMichael v. United States*, 751 F.2d at 303, 309 (8th Cir. 1985), *appeal after remand*, 856 F.2d 1026 (8th Cir. 1988), and therefore, neither of the remaining exceptions to Nebraska's general rule of non-liability applied. Slip op. at 6 (Mar. 15, 1989).

The court acknowledged that this result differed from its initial holding which was not based on all of the evidence. Slip op. at 2, 6 (Mar. 15, 1989). The court observed that the government's right to inspect was for the government's sole benefit to ensure that Western complied with the contract specifications and terms, and that the inspectors lacked authority to direct the activities of Western employees unless the inspectors issued a stop work order because of a safety violation. *Id.* at 3-4. The court considered whether the inspectors should have issued a stop work order and observed that the construction inspector, Mark Sintek, and his supervisor, Richard Schwisow, established that the inspectors did not normally issue stop work orders, but instead, informally discussed and resolved their concerns with Western's supervisors. *Id.* The court noted that Western's safety officer and foreman testified that he did not rely on the Bureau inspectors for their safety advice. *Id.* The court also found that the rule of the Bureau's project construction engineer, Robert McClure, was less crucial than that of James Pinkman, Western's project superintendent, with

respect to the decision to cut the concrete liner of the canal, and that the subordinates of both believed that the reason for cutting the liner was to give workers sufficient room to work, and not for safety reasons. *Id.* at 5. The court further found that Schwisow's inaction reflected little about the amount of government control over the project because his concern about the excavation was that the crew's efforts were being wasted, and not that the hold posed an unreasonable risk to the crew's safety or the safety of others. *Id.*

Despite its holding that the Bureau lacked sufficient control to impose a nondelegable duty under Nebraska law, the court went on to consider whether the Bureau acted negligently. The court held that even if the excavation qualified as extra-dangerous, insufficient evidence existed to show that the United States failed to take due and suitable precautions to protect Murdock from injury. *Id.* at 7. The court found that Schwisow did not know that the night crew would be working on the particular excavation the night of the accident, that Sintek did not recall ever seeing workers using whackers in excavations in which abutments had not already been placed, that the Bureau's inspectors had no way of knowing that workers would be working in the excavation because Western had not informed them of such plans, and that safety inspectors were not assigned to the night crew as a matter of course. *Id.* at 7-8.

The district court also held that the weight of the evidence did not support Murdock's claim that the government failed to exercise due care in designing the canal. *Id.* at 8. Finally, the district court observed that Murdock was negligent, but did not decide whether Murdock's

negligence would bar him from recovery under Nebraska law. *Id.*

The district court, in the order denying summary judgment, also concluded that no Nebraska statute imposed a nondelegable duty on the Bureau. Slip op. at 16-18 (No. 30, 1988). The court rejected Murdock's arguments that Neb. Rev. Stat. § 48-425 (Reissue 1988)[3] relating to supports used in the erection of certain structures, or Neb. Rev. Stat. § 48-433 (Reissue 1988)[4], a statute requiring architects or draftsmen to provide permanent structural features in specifications and drawings, applied. Slip op. at 16-18 (Nov. 30, 1988). The court also held that any duty imposed upon OSHA inspectors did not create liability for the Bureau. *Id.* at 18.

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[3] Neb. Rev. Stat. § 48-425 provides:

> All scaffolds, hoists, cranes, stays, ladders, supports or other mechanical contrivances used in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct or other structure, shall be erected and constructed in a safe, suitable and proper manner. . . .

[4] Neb. Rev. Stat. § 48-433 provides:

> All architects or draftsmen in preparing plans, specifications or drawings to be used in the erection, repairing, altering or removing of any building or structure within the terms and provisions of sections 48-425 to 48-435, shall provide in such plans, specifications and drawings for all the permanent structural features or requirements specified in said sections. Any person violating the provisions of this section shall be guilty of a Class IV misdemeanor.

A panel of this court held that the district court's holding that the Bureau did not retain sufficient control to justify imposing a duty to provide a safe workplace was not clearly erroneous. 917 F.2d at 1069. The panel reversed the district court's ruling on the Bureau's nondelegable duty under Nebraska case law. The panel held that the Bureau: (1) could not delegate its duty to protect workers engaged in the inherently dangerous activity of excavation work; and (2) failed to take suitable precautions to protect Murdock from injury. 917 F.2d at 1069-73. The panel also held that the Bureau's failure to ensure that safety procedures were followed was not protected by the discretionary function exception to the Federal Tort Claims Act. *Id.* at 1073. We granted rehearing en banc.

I.

Murdock first argues that the district court erred in holding that the United States did not have a nondelegable statutory duty. He argues that Neb. Rev. Stat. § 48-425 crates a nondelegable duty. That statute requires all supports used in the erection of any bridge or other structure be erected or constructed in a safe, suitable, and proper manner. Murdock contends that section 48-425 applies because the canal lining qualifies as a "structure" and that dirt constituted the "support" for the canal.

The district court rejected Murdock's argument, holding that, although the canal lining may qualify as a structure, dirt is not the type of support that the drafters of section 48-425 contemplated. Slip op. at 16 (Nov. 30, 1988). The court looked to the six enumerated items set

forth in the statute, "including supports or other mechanical contrivances," and observed that all of the listed instrumentalities, including the catchall provision ("other mechanical contrivances"), were mechanical. *Id.* The court stated that "[i]t would require an extremely liberal reading of "support" . . . to conclude that dirt is an instrumentality that is capable of being "erected and constructed" in a way that was contemplated by the drafters. *Id.* at 17. We are convinced that the district court did not err in rejecting Murdock's argument. We are mindful of the dictates of *Salve Regina College v. Russell*, 111 S. Ct. 1217 (1991), to review state law questions de novo, giving the district court ruling no deference. *Id.* at 1221. This we do, and we cite the district court's reasoning only because we find it compelling.

II.

Murdock next argues that the Bureau violated its statutory duties during the design phase of the project. Murdock contends that the Bureau had a nondelegable statutory duty under Neb. Rev. Stat. § 48-433, which provides that: "draftsmen in preparing plans, specifications or drawings to be used in the erection . . . of any . . . structure . . . shall provide [therein] for all the permanent structural features or requirements. . . . " Murdock says that the Bureau's plan and specifications negligently failed to prohibit Western from building heavy, unreinforced concrete canal lining before excavating for the bridge abutment, and that such a sequence of construction resulted in concrete overhanging the excavations.

Along similar lines, Murdock argues that the Bureau had a non-delegable duty under Nebraska law to design the canal, and that the Bureau's negligence in designing the canal is shown by the Bureau's failure to comply with its own Safety Design Standards and Construction Safety Standards. Again, he says that the drawing and specifications negligently failed to prohibit Western from erecting the canal lining before excavating for the bridge abutment.

The district court rejected Murdock's arguments, concluding that the sequencing and performance of the construction work was not a type of detail required by section 48-433 and could not be termed a "permanent structural feature." Slip op. at 17 (Nov. 30, 1988). The court also held that the Bureau did not negligently design the canal by failing to include for the sequencing of work in the drawing or specifications. Slip op. at 8. (Mar. 15, 1989).

The district court did not err in rejecting Murdock's arguments. Once again, we are convinced by the district court's reasoning that it correctly interpreted Neb. Rev. Stat. § 48-433. We also observe that the district court's rulings are supported by the testimony of the Chief of the Bureau's civil engineering division, who testified that the drawing in question reflected a proper design. Slip op. at 8 (Mar. 15, 1989). He explained that because safety regulations are a part of the contract, there is no reason to include a sequencing of work in the construction drawings, and that the Bureau's goal is to provide the contractor with as must discretion in the actual construction as feasible. *Id.*

III.

Murdock's next argument is that the district court erred in determining that under Nebraska common law the Bureau did not retain or exercise sufficient control over the work so as to require it to provide Western's employees with a safe place to work. Specifically, Murdock points to certain standards contained in the contract which provided that the Bureau had the right to inspect Western's work, issue safety directives to Western, and stop any work not in substantial compliance with the contract's drawings and specifications or in violation of the Bureau's Construction Safety Standards. The question of whether an owner retains sufficient control is a factual one. *See McMichael*, 751 F.2d at 309-10.

Murdock essentially argues that the Bureau had a mandatory duty to make safety inspections, and that as a matter of law, the Bureau was negligent for violating these mandatory duties. That the government had the right to inspect Western's work and to order that work be stopped does not translate into a finding that the Bureau retained sufficient control over Western's work. *See, e.g., United States v. Page*, 350 F.2d 28, 30-31 (10th Cir. 1965) (right to inspect the implementation of safety program does not necessarily constitute an exercise of control), *cert. denied*, 382 U.S. 979 (1966). The contract also required Western to supervise all work under the contract, and to take "proper safety and health precautions to protect- . . . workers." It is undisputed that the Bureau did not perform any of the excavation work. *Cf. McKinstry v. County of Cass*, 228 Neb. 733, 424 N.W.2d 322, 329 (1988). The district court, after trial, detailed the evidence which

led to its conclusion that the government control exercised in this case was markedly lower than that in *McMichael*, and this lack of control rendered both exceptions to Nebraska's general rule not applicable. Slip op. at 2-6 (Mar. 15, 1989). We have outlined those findings above, and are satisfied that they are not clearly erroneous.[5]

Even if we concluded that the government had a mandatory duty placed upon its, the district court's findings that the government agents exercised reasonable care in the performance of their duties regarding the excavation deprives Murdock's argument of persuasive force. The district court carefully considered the actions of the Bureau employees regarding the excavation, made detailed findings on this subject, and concluded that these employees exercised reasonable care in performing their duties relating to the excavation. Slip op. at 7-8. (Mar. 15, 1989).

We review these factual findings under the clearly erroneous standard. Two specific factual findings form the foundation for the district court's conclusion that the

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[5] Murdock argues that sufficient control to create a nondelegable duty is present in the circumstances of this case. He claims that the degree of control here is equal to that found in *Simon v. Omaha Public Power Dist.*, 189 Neb. 183, 202 N.W.2d 157 (Neb. 1972). *Simon* is not persuasive. In *Simon*, the defendant was not only the owner of the premises where the accident occurred, but also acted as general contractor. *Id.*

Bureau did not act negligently.[6] First, until the night of the accident, the members of the night crew had never

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[6] The district court stated:

> Sintek testified that he did not believe that the workers in the excavation were in imminent danger. The only workers who he saw in or near the excavation were the loader operator and a worker who was watering the walls of the excavation from above the hole. He did not recall ever seeing workers using whackers in excavations in which abutments had not already been placed. He had "eyeballed" the slopes on each of his visits to the site and had found that they were approximatly [sic] 45 degrees. He also attempted to inform Western's foreman of the unnecessary overexcavation and he informed his own supervisor of his concerns about the unnecessary excavation.
>
> Schwisow's testimony, in addition to his testimony recounted above, established that he observed the site at the end of the normal workday and that he had no knowledge that the night crew would be working in that particular excavation that night. There was testimony that the night crew, until the night of the accident, had never worked with whackers in a bridge abutment excavation on this project, although the night crew had previously worked with whackers to compact the soil around abutments after they had been placed.
>
> The testimony also showed that safety inspectors were no assigned to the night crew as a matter of course. The exception to this policy arose when the work that was performed by the night crew had to be ready to go the following morning so that the day crew could begin another task immediately. Wilson, the chief inspector, testified in his deposition

(Continued on following page)

worked with whackers in a bridge abutment excavation on this project, although they had used whackers to compact soil around abutments after the abutments had been placed – a later stage of the construction than was involved here. Slip op. at 8 (Mar. 15, 1989). Second, Schwisow did not know that the night crew would be working in the particular excavation the night of the accident. *Id.* These findings are fully supported by these individuals' testimony. Sintek testified that he had never observed a hand-held soil compactor in an excavation area before the placement of a bridge abutment. No Western representative ever told Sintek that a night-shift crew would be working in the excavation the night of the accident. Schwisow also testified that he had never seen hand-held soil compactors in an excavation area before the placement of a bridge abutment on an abutment footing, and that he was not informed the night-shift would be working in the excavation area the night of the accident. *Cf. Thorne v. United States*, 479 F.2d 804, 809-10 (9th Cir. 1973) (government liability imposed when Bureau recognized lack of proper precautions taken in trenching operation); *Rooney v. United States*, 634 F.2d 1238, 1244 (9th Cir. 1980) (government liability imposed when government knowingly permitted contractor to use

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> that he probably would have assigned an inspector to the night crew had he known that the excavation was to be backfilled and compacted, but that he had no way of knowing that workers would be their because the contractor did not inform the Bureau of any plans to have workers there.

Slip op. at 7-8 (Mar. 15, 1989).

inexperienced, careless crew); *Simon*, 202 N.W.2d at 164 (liability imposed when power district aware of unguarded holes).

The testimony of Sintek and Schwisow supports the district court's findings. Insofar as there may have been differing testimony, the district court had the responsibility of resolving the conflicts. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985). *Anderson* makes clear that "[t]he reviewing court oversteps the bounds of its duty under rule 52(a) if it undertakes to duplicate the rule of the lower court." *Id.* at 573. "If the district court's account of the evidence is plausible in light of the record viewed in its entirely, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 573-74.

IV.

In view of the conclusions we have reached, it is unnecessary to consider the questions of the application of the discretionary function exception, contributory negligence or assumption of risk.

We affirm the judgment of the district court.

HEANEY, Senior Circuit Judge, dissenting, with whom **LAY,** Chief Judge, and **MCMILLIAN,** Circuit Judge, join.

This case should not be before this court for en banc consideration. Our rules are clear that en banc disposition is "rigidly" reserved for cases of "grave constitutional dimension or exceptional public importance, or to an opinion that directly conflicts with Supreme Court or Eighth Circuit precedent." 8th Cir. R. 35A(a). It is not apparent nor has it been demonstrated that this case meets any of these standards. Certainly the panel opinion does not conflict with any federal, or even state, precedent. Moreover, the only thing "grave" or "important" about this case was the tragedy suffered by Dennis Murdock and his family; that is, unless holding the government liable for this tragedy satisfies either of these criteria.

As the majority's opinion attests, this case turns on applying state law to largely uncontroverted facts. Such a case should rarely, if ever, justify the convening of a federal court of appeals en banc. Our rules recognize and establish this fact, explicitly explaining that asserted errors in the determination of the facts or state law are not matters for rehearing en banc. 8th Cir. R. 35A(a). Thus, regardless of the outcome, we should not have reheard this case en banc. Compounding the confusion created by the court's disregard of our own rules is the en banc majority's decision, which misapplies Nebraska law, and therefore compels this dissent.

I. The Bureau's Nondelegable Duty

The majority proceeds under the legal theory that before it can conduct nondelegable duty analysis under Nebraska law it must first find that the employer, here the Bureau, retained control of the work which injured the victim. *See ante* at 10. To support this approach, the majority cites *Erickson v. Monarch Industries, Inc.*, 347 N.W.2d 99, 105 (Neb. 1984). This understanding of Nebraska Law is mistaken. Rather than requiring a finding of retention of control before examining the nondelegable duty issue, Nebraska law provides that the principal remains liable for the negligence of the contractor " 'if he retains 'control' of the work – or if, by rule of law or statute, the duty to guard against the risk is made 'nondelegable.' ' " *Id.* at 105 (quoting *Fund v. General Motors Corp.*, 220 N.W.2d 641, 645 (Mich. 1974)) (emphasis added).[1]

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[1] *Erickson*'s discussion of an earlier Nebraska case demonstrates that this alternative analysis is the proper one under Nebraska law. In this discussion, the Supreme Court of Nebraska noted that in *Hickman v. Parks Construction Co.*, 76 N.W.2d 403 (Neb. 1956), "[d]efendant argued that it was not liable, as it had left the matter of protecting the site to the officer in charge of the club. We held the duty to protect against the danger to be nondelegable." *Erickson v. Monarch Indus., Inc.*, 347 N.W.2d at 106. Thus, according to Nebraska law, reaching the nondelegable duty issue is not contingent on first finding that the principal retained control over the work.

II. The Bureau's Negligence

Despite concluding that the government did not retain control sufficient to expose it to liability, the majority defies its own understanding of Nebraska law and offers its opinion that the district court did not clearly err in ruling that the Bureau did not act negligently. Implicit in this offering is the concession that a nondelegable duty existed "to see that the work is done with the requisite degree of care." *Erickson v. Monarch Indus., Inc.*, 347 N.W.2d at 105 (quoting *Witucke v. Presque Isle Bank*, 243 N.W.2d 907, 912 (Mich. Ct. App. 1976)). Because the Bureau was negligent in its supervision of the work site, I disagree with the majority's conclusion that the Bureau did not breach its nondelegable duty.

By approving the district court's ruling, the majority joins the trial court in ignoring and discounting the evidence that both the Bureau and Weston admitted: that the unsupported, unreinforced canal lining was apt to collapse; that the Bureau was aware that the "chipping off" to which it agreed in order to ensure workers' safety was not being followed; that the Bureau knew that, due to its composition, the soil in the excavation area was prone to sloughing; that the Bureau was aware that the slope in the excavation exceeded that permitted by the Construction Safety Standards which governed the project's safety conditions; that the Bureau knew compacting was necessary; and that the night crew had compacted before. Nebraska law deems such a situation inherently dangerous. *See Erickson v. Monarch Indus. Inc.*, 347 N.W.2d at 99 (electrical transformer is inherently dangerous); *McKinstry v. Cass County*, 424 N.W.2d 322, 329 (Neb. 1988)

(excavated trench is inherently dangerous); *Crosswhite v. City of Lincoln*, 175 N.W.2d 908, 911 (Neb. 1970) (pipe protruding through a sidewalk creates a dangerous condition); *Colvin v. John Powell & Co.*, 77 N.W.2d 900, 908-10 (Neb. 1956) (poison-tainted molasses barrels are dangerous); *Hickman v. Parks Construction Co.*, 76 N.W.2d 403, 407-10 (Neb. 1956) (excavated trench is inherently dangerous). In an inherently dangerous situation, Nebraska law imposes a nondelegable duty on the owner of the land, in this case the Bureau, "to see that all appropriate precautions are taken by the one to perform the inherently dangerous task. . . . There is a nondelegable duty to see that work is done with the requisite degree of care; when the contractor fails in fulfilling its duty of care, the principal has breached its own precautionary duty." *Erickson v. Monarch Indus., Inc.*, 347 N.W.2d at 105 (quoting *Witucke v. Presque Isle Bank*, 243 N.W.2d 907, 912 (Mich. Ct. App. 1976)).

Although Nebraska law deems the accident site here, an inherently dangerous situation, the majority has ignored, or at least discounted, the evidence which demands this legal conclusion. Doing so facilitates its conclusion of non-negligence. The majority's discounting of facts, however, goes beyond those that it does not mention and surfaces in its recitation of the facts on which it bases its decision. Indeed, without this additional discounting, the majority's position would be untenable.

The majority relies on the testimony of March Sintek and Richard Schwisow to justify its conclusion of non-negligence. As the majority states, these two claimed that they were unaware that a night crew would be working

at the site of the accident on the night it occurred. What the majority does not mention, however is that other aspects of Sintek's and Schwisow's testimony are implausible and tend to discredit their entire testimony. *See Murdock v. Employers Ins. of Wausau*, 917 F.2d 1065, 1071 (8th Cir. 1990) *vacated, reh'g granted* January 3, 1991 (Sintek's and Schwisow's testimony regarding angle of repose and exposure of canal lining contradict). Moreover, the very testimony on which the majority rests its conclusion of non-negligence is itself highly questionable.

At least three facts cast doubt on the testimony of these two individuals that they were not aware that the night crew would be working at the site on the night the accident occurred. First, undisputed evidence indicates that the night crew had compacted in the excavations prior to the night of the accident. Second, the Bureau was aware of this previous activity. Sintek, the Bureau's safety inspector, told Schwisow, the Supervisory Construction Inspector, that the night crew had compacted before. Schwisow's claim that he did not believe that night compacting would occur belies his own testimony that, in Schwisow's words, night compacting "was being done with our knowledge." This discrepancy is particularly startling when it is recalled that other aspects of their testimony were implausible. Third, the Bureau was also aware that the excavation was deeper than necessary, supported by an unreinforced lining, not properly "chipped-off," sloped in excess of the governing standards, prone to sloughing, and in need of compacting. The majority ignores these facts to conclude that Sintek's and Schwisow's testimony justify a holding of non-negligence. Because the Bureau was aware of these facts, the

Bureau was negligent for not rectifying these unsafe conditions, or at least banning compacting until safe working conditions were established.[2]

Conclusion

Nebraska law burdened the Bureau with a duty to ensure the safety of its contractor's workers. This burden is not evaluated under a strict liability standard. The law understands that despite numerous safety precautions, accidents still occur. Here, however, the Bureau knew that the night crew had compacted before and that the excavation was dangerous for the reasons stated above. The Bureau's defense that it did not anticipate night compacting is simply unacceptable when the Bureau's own Supervisory Construction Inspector testified that night compacting "was being done with our knowledge." For this reason, and those stated in the original panel opinion, I respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[2] Although the majority does not reach the discretionary function exception of the Federal Torts Claim Act, 28 U.S.C. § 2680(a) (1988), I restate my agreement with the district court that the Bureau's conduct here was not protected by this exception. *See Murdock v. Employers Ins. of Wausau*, 917 F.2d 1065, 1073 (8th Cir. 1990) *vacated, reh'g granted* January 3, 1991.

APPENDIX B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 89-2303

Dennis Murdock and Sharon Murdock, for themselves and as parents and next friends of their minor child, Shawn M. Murdock,	*	
Appellants,	*	
v.	*	Appeal From the United States District Court for the District of Nebraska.
Employers Insurance of Wausau, a Corporation,	*	
v.	*	
United States of America,	*	
Appellee,	*	
Western Contracting Corporation,	*	
Appellee.	*	

Submitted: June 11, 1990
Filed: October 24 1990

Before LAY, Chief Judge; HEANEY, Senior Circuit Judge; and JOHN R. GIBSON, Circuit Judge.

HEANEY, Senior Circuit Judge.

Dennis Murdock was injured when a section of the Mirdan Canal collapsed upon him while he was working in an excavation adjacent to the canal. Murdock was employed by Western Contracting (Western), who the United States contracted with to build the canal. Murdock and his family brought suit against the United States to recover damages, asserting that the United States – on notice that a hazardous situation existed – was negligent in failing to take adequate precautions to ensure a safe place to work. The district court entered judgment for the United States. We affirm in part, reverse in part, and remand for action consistent with this opinion.

BACKGROUND

In 1981, the Bureau of Reclamation (Bureau), contracted with Western for the construction of the Mirdan Canal in Nebraska, part of the Pick-Sloan Missouri Basin Program. The contract incorporated detailed specifications as well as administrative and statutory safety standards. The contract provided that the Bureau would continuously inspect construction activities to ensure compliance with the safety and health standards in paragraph 1.1.4 of the contract. Among these standards were the following:[1]

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[1] The district court mistakenly held that the language of paragraph 10 of the contract, which provides that the quality inspection requirements of paragraph 10 are for the sole benefit

(Continued on following page)

> The contractor shall not require any laborer . . . employed in the performance of the contract to work under conditions which are . . . hazardous, or dangerous to his health or safety, as determined under construction safety and health standards promulgated by the Secretary of Labor under section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327), as amended, and "Construction Safety Standards," published by WRPS (Water and Power Resources Service.)
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> . . .

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of the government, applies equally to the health and safety standards set forth in paragraph 1.1.4. Paragraph 10 provides:

> (a) All work (which term includes but is not restricted to materials, workmanship, and manufacture and fabrication of components) shall be subject to inspection and test by the Government at all reasonable times and at all places prior to acceptance. Any such inspection and test is for the sole benefit of the Government and shall not relieve the Contractor of the responsibility of providing quality control measures to assure that the work strictly complies with the contract requirements. No inspection or test by the Government shall be construed as constituting or implying acceptance. Inspection or test shall not relieve the Contractor of responsibility for damage to or loss of the material prior to acceptance, nor in any way affect the continuing rights of the Government after acceptance of the completed work under the terms of paragraph (f) of this clause, except as hereinabove provided.

The health and safety standards are for the benefit of the government and for the workers employed on the job, while the quality standards are solely for the protection of the government.

> "When violations of the safety and health requirements . . . are called to the attention [of the contractor] by the contracting officer or his authorized representatives, the contractor shall immediately correct the condition . . . . "
>
> In the event the contractor fails or refuses to promptly comply with the compliance directive . . . , the contracting officer or his authorized representative may issue an order to stop all or any part of the work.

Paragraphs 1.1.4a, d and e.

In 1982, early in the construction phase of the project, James Pinkman, Western's senior construction employee, approached Robert McClure, the Bureau's senior construction official, with a proposal that Western be allowed to erect the unreinforced concrete lining of the canal before erecting the abutments for road bridges which would cross over the canal. The canal lining would be supported by the surrounding soil. McClure expressed concern to Pinkman that erecting the canal before the abutments might prove hazardous because significant areas adjacent to the canal would have to be excavated to allow for the abutments. He noted that this procedure would result in undercutting the soil foundation of the canal lining, thereby exposing unreinforced cement to collapse. In order to ensure against collapse, McClure stated that it "will probably be all right but you need to cut off part of that curb to reduce the weight of the overhanging lining." Transcript at 469-70; Deposition of McClure at 26. "Chipping off" the curb and top two or three feet of canal lining became the standard practice at excavation sites throughout the project.

The contract required that a bridge be built at Station 372+74. In early summer 1985, an 82-foot long excavation was dug to facilitate the construction of the bridge. The canal lining was left uncut. Pursuant to the contract, the excavation was partially refilled and compacted. On June 12th during the day shift, the foreman for Western, Rick Everist, directed workers to re-excavate the site because the site failed a density test. They did so to a depth of approximately 12 to 14 feet, some four feet deeper than required by the contract.

Mark Sintek, a Bureau safety inspector, testified that on June 12th he was at the station twice in the morning and twice in the afternoon. He stated that when he last visited the site during the afternoon, the only equipment in the area was a front-end loader; that the dirt slope from the top of the canal lining wall to the bottom of the excavation area was at an angle of repose of anywhere from one-half to one to one to one; that no more than two feet of the canal wall was exposed; that he knew the concrete lining was unreinforced; that no hand-held soil compactors, "Whacker-Packers," were present at the site; that he told Everist that further excavation of the site was unnecessary; that he told Richard Schwisow, supervisory Construction Inspector, that the excavation was deeper than necessary; that he was aware that a night shift was working on June 12th; and that some soil compacting work had been done by that shift. He stated, however, that he drove by the site at 7:00 p.m. and observed no activity. He finally testified that he was authorized to call Western's attention to safety violations and to stop all or

part of the work if he deemed there to be a safety problem on the job. In a report filed the day after the accident, Sintek stated:

> Contractor's night shift crew came to work and began compacting material back into over-excavation area when later in shift, material caved in. Canal lining broke along #1 longitudinal joint. Contractor had been cutting canal lining out at top, down approximately 3 feet to make room to construct bridge abutments. *In the area left of where accident occurred, lining was cut too far upstream from where abutments were to be placed, thus the overhanging of canal lining and the undermining of material contributed to the accident as well as lack of proper safety precautions and supervision.*

Report of Sintek dated June 13, 1985 (emphasis added).

Schwisow testified that it was his responsibility to supervise construction activity at the site, that he observed the site at 3:00 p.m. on June 12th, and that he saw a front-end loader in the 12-foot deep excavation at the site. He did not view the excavation area to be unsafe at the time because the banks of the excavation were not sloughing and no workers were in the excavation. He testified that he believed that work – not including backfilling and compacting near the abutment – would continue through the night and that he would talk to Everist about the unnecessary excavation in the morning. In his report of the accident, Schwisow stated:

> On June 12, 1985, during my daily inspection tour of the Mirdan Canal, Section 1, at approximately 3:00 p.m., I stopped by station 372+74 county road bridge site. I observed a front-end

> loader excavating the left abutment after a failing test. I asked a laborer that was watching this operation if he knew that they only needed to excavate 8.5 feet below the top of the lining. He said yes, but it appeared that the front-end loader operator was below this several feet. At this time, the material under the 1 1/2:1 unreinforced lining was excavated out to about four feet below the top of the lining on about 1/2:1 slope.
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> . . .
>
> Sometimes when the crew did not have much to do, they would . . . do some dress-up work and minor compacted backfill around structures. This was always checked the next day for densities to check the small amount of backfill being compacted. This was being done with our knowledge and due to the off and on type of work, an inspector was not assigned to watch this work during the night shift.

Report of Schwisow dated December 6, 1985.

Everist, the day foreman, testified that he spoke with Western's night foreman, Tom Kusek, regarding work to be performed on the night shift. Everist indicated that he wanted the fill adjacent to the abutment to be compacted. He also testified that the night crew generally did not compact fill for bridge abutments but that they occasionally did minor compacting.

Murdock was employed by Western as part of the night shift crew. This shift began at 5:00 p.m. That crew was primarily responsible for restocking, running a trimmer machine, and maintenance of the roads used during the day shift. When Kusek observed the site shortly after

reporting to work, he testified that two feet of canal lining was exposed. He told Murdock and the other workers at the site to watch for sloughing or movement of dirt within the excavation area. At 8:00 p.m., Kusek left the site. He returned at 11:00 p.m. At that time, he stated that from four to eight feet of the canal lining was exposed.[2] He did not order Murdock and the other employee out of the excavation.

At 11:20 p.m., 41 feet of the canal lining at Station 372+74 collapsed on Murdock and another worker. Murdock sustained serious injuries. Deposition Exhibit 1D prepared by C. A. Currie, Bureau Project Safety Manager, depicts the accident. *See* Appendix. The exhibit shows that the excavation was approximately 12 feet deep, that the curb and approximately two to three feet of lining which normally would have been removed had not been removed in this case, and that the lining broke at a contraction joint about ten feet from the curb.

Murdock and his family brought this action against the United States in federal court pursuant to the Federal Tort Claims Act (FTCA) to recover under Nebraska law for damages he sustained as a result of the canal lining falling on top of him. After extensive discovery, both parties moved for summary judgment. The court denied both motions. The matter then proceeded to trial, where the evidence summarized above was introduced. The district court ruled in favor of the government. In so ruling, it stated that "Nebraska law recognizes two exceptions to

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[2] Murdock testified that at 11:00 p.m. from ten to twelve feet of canal lining was exposed.

the general rule that an owner may not be liable for the negligence of an independent contractor."

> [1.] When the evidence establishes that [an] owner retain[s] control over [a] project.

The court found that the Bureau did not retain sufficient control to justify the imposition of a duty to provide a safe workplace.[3] This holding is not clearly erroneous.

> [2.] When by rule or law or by statute a duty of the owner [is] nondelegable. In Nebraska a duty to take due and suitable precautions devolves upon a party who is responsible for a dangerous place, agency, instrumentality or operation likely to cause injury or damage to persons and this duty is nondelegable.

The court assumed that the excavation was a dangerous place of operation but held that the Bureau took

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[3] On the parties' motions for summary judgment, the district court held, on the facts before it at that time, that the government retained sufficient control over the project to justify the imposition of a duty to provide Murdock a safe place to work. *Id.* at 2. After trial, the court found significant the trial testimony of Bureau employees regarding the Bureau's actions when one of its employees became concerned over the safety at the construction site to be significant. *Id.* at 4-6. It then held that the Bureau did not retain control. *Id.* It further held that no unfair prejudice resulted from its change. *Id.* at 7. We agree. The trial court had the right to consider all evidence. Thus, it was not a violation of due process.

due and suitable precautions to ensure a safe workplace.[4] It further held that Murdock was negligent.[5]

DISCUSSION

"To prevail in an action based on negligence, a plaintiff must prove four essential elements: the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages." *Zeller v. County of Howard*, 419 N.W.2d 654, 657 (Neb. 1988).

I. THE BUREAU'S NEGLIGENCE

The general rule in Nebraska is that the owner is not liable for physical harm caused to another by the acts or omissions of the contractor or the contractor's employees. *Sullivan v. Geo. A. Hormel and Co.*, 303 N.W.2d 476 (Neb. 1981). The owner, however, as the district court noted, remains liable for negligence on the construction site if (1) the employer retains control of the work; (2) Nebraska common law creates a nondelegable duty; or (3) Nebraska statutes create a nondelegable duty. *Erickson v. Monarch Indus.*, 347 N.W.2d 99, 105 (Neb. 1984). We

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[4] The district court held that the Bureau owed Murdock no statutory duty under Nebraska law. *Murdock v. United States*, No. 86-L-492, slip op. at 16-17 (D. Neb. Nov. 30, 1988). *See* n.8 *infra*. It also held that the Bureau exercised due care in designing the canal. *Id.* at 9. We agree with this latter conclusion.

[5] The court stated it would not decide "whether the extent of his negligence would be sufficient to bar his recovery" under Nebraska law. *Id.* at 9.

believe that the Nebraska common law creates a non-delegable duty running from the Bureau to Murdock.

Under Nebraska common law, an owner of land is responsible to ensure that its contractor takes all appropriate precautions in performing an inherently dangerous task. *Id.* (quoting *Witucke v. Presque Isle Bank*, 68 Mich.App. 599, 610, 243 N.W.2d 907, 912 (1976)). This " 'nondelegable duty exception is based upon the theory that certain responsibilities of a principal are so important that the principal should not be permitted to bargain away the risks of performance.' " *Id.* (quoting *Arsand v. City of Franklin*, 83 Wis.2d 40, 54 n.8, 264 N.W.2d 579, 568 n.8 (1978)). The district court did not reach the question of whether the construction at this site was an inherently dangerous activity. It instead held that assuming this fact, the Bureau had not breached its duty to take due and suitable precautions to protect Murdock from injury. In short, it held that no agent of the government acted negligently.

Nebraska has squarely faced the issue of whether excavation, similar to that undertaken here, is inherently dangerous and has decided the issue in the affirmative. *McKinstry v. Cass County*, 424 N.W.2d 322 (Neb. 1988); *Hickman v. Parks Construction Co.*, 76 N.W.2d 403 (Neb. 1956). In *Hickman*, the Air Force had entered into a contract with a construction company to improve the area adjacent to an officers' club. Part of the improvements included a new wall.

> The construction of the wall required the digging or excavating of a ditch or trench the length of this south boundary line the purpose of which was to contain the footing and a base

> for the wall. Accordingly, . . . the necessary excavating was done. . . . The excavation was about 4 feet wide and about 4 1/2 feet deep. In the excavation were placed forms for the pouring of a concrete base for the wall 8 inches thick with a footing of about 1 foot 8 inches. The concrete was poured and the forms removed. The portion of the excavation to the north of the concrete base was backfilled so that the area north from the concrete was relatively even or level. The portion to the south was not backfilled completely if at all.

Hickman, 76 N.W.2d at 407. The court held that the excavation, four feet wide by four and a half feet deep and backfilled on one side, was a dangerous place. *Id.* at 408-09. *See also Erickson*, 347 N.W.2d at 99 (electrical transformer was a dangerous instrumentality); *Crosswhite v. City of Lincoln*, 175 N.W.2d 908 (Neb. 1970) (a sidewalk where a protruding pipe was located was a "dangerous sidewalk condition"); *Colvin v. John Powell & Co.*, 77 N.W.2d 900 (Neb. 1956) (molasses barrels tainted with poison were dangerous instrumentalities). *Cf. Pendleton Woolen Mills v. Vending Assoc., Inc.*, 237 N.W.2d 99, 102 (Neb. 1975) (the Court did "not believe that the pop machine involved in this case could be considered a 'dangerous instrumentality' "). Thus, the district court's assumption that the Bureau had a nondelegable duty to take due and suitable precautions to ensure a safe workplace is correct.

The Nebraska view reflects the position of the Restatement of Torts (Second).

> § 427. Negligence as to Danger Inherent in the Work
>
> One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

Restatement of Torts (Second) § 427 (1965). The Restatement further explained:

> The rule stated in this Section is commonly expressed by the courts in terms of liability of the employer for negligence of the contractor in doing work which is "inherently" or "intrinsically" dangerous. It is not, however, necessary to the employer's liability that the work be of a kind which cannot be done without a risk of harm to others, or that it be of a kind which involves a high degree of risk of such harm, or that the risk be one of very serious harm, such as death or serious bodily injury.

Id. § 427 Comment b. *See also Zrust v. Spencer Foods, Inc.*, 667 F.2d 760, 765 (8th Cir. 1982) (the Nebraska Supreme Court frequently and extensively relies on the Restatement of Torts, particularly in the area of worker safety).

As noted above, under the inherently dangerous doctrine, the Nebraska Supreme Court has held that an owner must take all appropriate precautions to ensure

that an inherently dangerous task is safely completed. *Erickson*, 347 N.W.2d at 105.

> "The doctrine, in short, says that the principal is negligent, and hence liable, because it has allowed the independent contractor to be negligent in performing the job. There is a nondelegable duty to see that the work is done with the requisite degree of care."

Id. (quoting *Witucke v. Presque Isle Bank*, 68 Mich.App. 599, 610, 243 N.W.2d 907, 912 (1976)). While some states have held that employees of independent contractors do not benefit from the nondelegable duty rule arising from inherently dangerous work, *see Vagle v. Pickands Mather & Co.*, 611 F.2d 1212 (8th Cir. 1979) (construing Minnesota law), the Nebraska Supreme Court has allowed employees of independent contractors to recover under this doctrine. *Simon v. Omaha Public Power District*, 202 N.W.2d 157, 164 (Neb. 1972); *see also Giarratano v. Weitz Co.*, 147 N.W.2d 824, 834 (Iowa 1967); *Mallory v. Louisiana Pure Ice & Supply Co.*, 6 S.W.2d 617, 624 (Mo. banc 1928).[6] Thus, the question is whether in this dangerous place the Bureau took due and suitable precautions to protect Murdock from injury.

Officials from both the Bureau and Western admitted that the unsupported, unreinforced canal lining was apt to collapse and thereby posed a significant risk to

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[6] Our review of Nebraska case law, particularly *Erickson*, *Hickman*, *McKinstry*, *Simon*, and *Johnson v. Weborg*, 7 N.W.2d 65 (Neb. 1942), indicates that the owner is not a guarantor but instead has a separate and distinct duty to ensure that adequate precautions are taken.

employees working adjacent to the lining. *Murdock v. United States*, No. 86-L-492, Transcript at 469-70 (D. Neb. Sept. 6, 1989) (testimony of McClure, Bureau inspector) [Tr.]; *Murdock v. United States*, No 86-L-492, Deposition of McClure at 24-26 (D. Neb. March 15, 1988) [Depo. of]; Depo. of Walter Long, Chief of the Water Conveyance Branch for the Bureau, at 44-45; Depo. of Thomas Haider, Bureau designer of the canal, at 28-29. The Bureau and western agreed upon a procedure to ensure workers' safety. *Id.* This procedure involved "chipping off" the curb and the top two or three feet of the canal lining in the area in which the work is to be performed. Two separate Bureau inspectors viewed the excavation several times on June 12th and were aware that neither the curb nor the top two or three feet of the lining had been "chipped off" in the area near the bridge abutment. Tr. at 43, 77, 82, and 1044 (inspectors Sintek and Schwisow). Depo. of Sintek at 20-21, 45-46; Depo. of Schwisow at 25, 56. They were also aware that the soil in the area was sandy and prone to sloughing. They knew that the excavation had to be refilled and compacted, partially by hand. They were also aware that on occasion hand compacting was done by the night crew. Tr. at 152, 153, and 819; Depo. of Kusek at 13-14. No slide protection was placed on the banks of the excavation, nor was the canal lining braced. *See* Tr. at 87, 112-114, 1100-1101, 1115, 1133-1134.

Sintek and Schwisow's testimony regarding the extent to which the concrete lining was exposed at that time and the angle of repose of the earth supporting the canal lining is implausible. Both Schwisow and Sintek stated that the angle of repose of the earth supporting the

canal lining at or about 4:00 p.m. was approximately one to one and that only two or three feet of the canal lining was exposed. These witnesses cannot be right in both particulars. If only two or three feet of the canal were exposed, the angle of repose would have to have been significantly steeper, thereby increasing the probability that there would be extensive sloughing of earth from under the canal lining. *See* Appendix (line B). On the other hand, if the angle of repose was in fact one to one, then approximately ten feet of the canal lining would have had to have been exposed. *See id.* (line A).

The district court takes the position that even if the condition at the site was a dangerous one, the Bureau cannot be held responsible for Murdock's injury because the Bureau did not believe that employees would be compacting soil in the excavation during the night shift. There are three answers to this assertion. First, undisputed evidence indicates that some tamping and compacting in excavations had been done by night crews in the past. Undisputed evidence also indicates that the Bureau was aware of this fact. Thus, the Bureau should have anticipated that workers might well work in the excavation on the night in question, and consequently the Bureau should have taken the steps necessary to protect them.[7] This was a part of its nondelegable duty.

Second, even if the Bureau did not believe that the night shift crew would be working in the excavation, it knew that the contractor had the right to require the

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[7] For this reason, it is clear that the Bureau's negligence proximately caused Murdock's injuries.

night shift to compact soil in the excavation and that compacting the soil in the excavation might be dangerous since the uncut canal lining posed a danger to anyone working in the excavation. In light of its nondelegable duty, the Bureau had the responsibility to enter an order requiring the contractor to refrain from any further activities in the excavation until the unsafe conditions had been corrected.

Third, the government knew that hand compacting in the excavation was necessary, that the employees doing that compacting would have to work under the canal lining, and that it was unsafe for them to do so. Thus, irrespective of when the work was to be performed and because the inspectors knew that they would not be at that site at all times when work was being performed, the Bureau had an obligation to issue a stop order until the unsafe condition was remedied. In light of the obvious safety violation, the Bureau had the right and the duty to enter a stop work order at this site until the unsafe conditions had been corrected.[8]

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[8] An argument can also be made that the Bureau breached a nondelegable duty under Neb. Rev. Stat. § 48-425, which provides that "[a]ll . . . supports . . . used in the erection . . . of any bridge . . . or other structure shall be erected and constructed in a safe, suitable and proper manner." The duty being to ensure that the earthen support of the canal lining during the construction process was safe. In light of our holding that the Bureau breached its common law nondelegable duty, we need not reach this issue.

II. CONTRIBUTORY NEGLIGENCE

The district court held in a single sentence that Murdock was negligent. It refrained from determining whether Murdock's negligence was sufficient under Nebraska law to bar his recovery. In Nebraska, an "actor is contributorily negligent if (1) he or she fails to protect himself or herself from injury, (2) his or her conduct concurs and cooperates with the defendant's actionable negligence, and (3) his or her conduct contributes to his or her injuries as a proximate cause." *E.g., Howells Elevator v. Stanco Farm Supply*, 455 N.W.2d 777, 781 (Neb. 1990). Nebraska provides, however, that a plaintiff's negligence "shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence . . . of the defendant was gross in comparison." Neb. Rev. Stat. § 25-21,185. We read the district court's opinion as leaving open the question of whether Murdock's negligence was slight as compared with that of the Bureau. If it was slight, then Murdock is entitled to recover damages, the amount to be determined in accordance with the Nebraska Comparative Negligence instruction.[9]

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[9] The Nebraska Comparative Negligence instruction from the Uniform Instructions states in part:

Negligence
NJI 2.02A
CONTRIBUTORY AND COMPARATIVE
NEGLIGENCE

. . .

a. If upon comparison you decide that the plaintiff's negligence was more than slight, or that the defendant's was less than great, then your verdict must be for the defendant.

(Continued on following page)

The Bureau vigorously asserts in its brief that there is clear evidence supporting the district court's finding that Murdock was negligent. It would have been helpful to us if the district court had stated its reasons for this finding. Nonetheless, we are not prepared to hold that that finding was clearly erroneous. We emphasize, however, that the district court did not find that Murdock's negligence was sufficient to bar his recovery. We leave that decision to the district court. Our silence on this issue is not intended to indicate acceptance of the government's contention in its brief on this issue.

III. DISCRETIONARY FUNCTION EXCEPTION

The district court held that the Bureau's conduct was not protected by the discretionary function exception found in the FTCA. It concluded, relying on *McMichael v. United States*, 856 F.2d 1026 (8th Cir. 1988), that the decision of Bureau employees not to stop work earlier in the

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(Continued from previous page)

b. If, however, upon comparison, you decide that the plaintiff's negligence was slight and that the defendant's was gross, then your verdict must be for the plaintiff. To compute the amount of that verdict you shall determine the amount of the plaintiff's damage in accordance with Instruction No. ___. You must then decide what percent of the total negligence was attributable to the plaintiff and reduce the amount of (his, her, its) total damages by that same percent, returning a verdict for the balance only.

The words "slight" and "gross" as used here are comparative words. The negligence of a party is not to be evaluated as slight or gross standing alone but only when compared with that of the other party.

day at the site where the accident occurred fell outside of this exception because the employees' duties included ensuring that all unsafe practices were corrected immediately. *Murdock v. United States*, No. 86-L-492, slip op. at 15-16 (D. Neb. Nov. 30, 1988).

28 U.S.C. § 2680(a) eliminates the FTCA's authorization for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." In determining whether the challenge conduct falls within this exception, we first ask whether the action or inaction is a matter of choice for the acting employee. *Dalehite v. United States*, 346 U.S. 15, 34 (1953); *McMichael*, 856 F.2d at 1031. "If the challenge conduct does, however, involve an element of judgment, we must then determine whether that judgment is of the kind that the discretionary function exception was designed to shield." *McMichael*, 856 F.2d at 1032.

We agree with the district court that the analysis and result in *McMichael* controls this case. In that case, we held that the government's initial decision to set forth certain policies was within the discretionary function exception but that the government's failure to comply with its own policies falls outside its scope. *Id.* at 1033. Likewise, the Bureau's decision as to what procedure should be followed when excavating near bridge abutments is within the exception, but the Bureau's failure to ensure that that procedure was followed is outside the scope of the exception. *See also E. Ritter & Co. v. Dep't of the Army*, 874 F.2d 1236, 1241 (8th Cir. 1989) (focusing on

whether the government's conduct involved policy concerns).

CONCLUSION

We affirm in part, reverse in part, and remand to the district court with directions to it to enter judgment against the Bureau on the question of liability, to determine whether Murdock's negligence is more than slight, to determine the extent of Murdock's damages, and to determine the extent, if any, to which these damages should be reduced because of Murdock's negligence.

JOHN R. GIBSON, Circuit Judge, dissenting.

I respectfully dissent. I would affirm the judgment of the district court.

First, I am satisfied that the district court did not err in its finding that the government did not retain sufficient control over the project to justify the imposition of a duty upon it. I agree with the district court that the facts in this case are substantially different from those in *McMichael v. United States*, 751 F.2d 303 (8th Cir. 1985), *appeal after remand*, 856 F.2d 1026 (8th Cir. 1988). Our later *McMichael* decision stressed that a 51-part checklist contained a specific requirement that the contractor comply with an electrical storm procedure, and, in the event of an electrical storm, the defense contract administration personnel were to evacuate areas of the building that contained explosive materials. 856 F.2d at 1033. In *McMichael*, this mandatory duty of evacuation was violated, the government inspectors had no discretion, and the discretionary function exception was held inapplicable. *Id.* at 1033-34. In the case before us, however, government employees

exercised control of a far more general nature. The district court did not err in concluding that the government's control was "markedly lower" than that found in *McMichael. Murdock v. United States*, No. CV86-L-492, slip op. at 6 (D. Neb. Nov. 30, 1988).

The determinative issue in this case is whether Bureau employees Mark Sintek and Richard Schwisow were negligent because they failed to issue stop orders. The district court made detailed findings on this subject, concluding that these employees had exercised reasonable precautions in the performance of their duties regarding the excavation and that neither Sintek nor Schwisow nor any other government agent acted negligently. The district court stated:

> Sintek testified that he did not believe that the workers in the excavation were in imminent danger. The only workers who [sic] he saw in or near the excavation were the loader operator and a worker who was watering the walls of the excavation from above the hole. He did not recall ever seeing workers using whackers in excavations in which abutments had not already been placed. He had "eyeballed" the slopes on each of his visits to the site and had found that they were approximatley [sic] 45 degrees. He also attempted to inform Western's foreman of the unnecessary overexcavation and he informed his own supervisor of his concerns about the unnecessary excavation.
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> Schwisow's testimony, in addition to his testimony recounted above, established that he observed the site at the end of the normal workday and that he had no knowledge that the night crew would be working in that particular

> excavation that night. There was testimony that the night crew, until the night of the accident, had never worked with whackers in a bridge abutment excavation on this project, although the night crew had previously worked with whackers to compact the soil around abutments after they had been placed.
>
> The testimony also showed that safety inspectors were not assigned to the night crew as a matter of course. The exception to this policy arose when the work that was performed by the night crew had to be ready to go the following morning so that the day crew could begin another task immediately. Wilson, the chief inspector, testified in his deposition that he probably would have assigned an inspector to the night crew had he known that the excavation was to be backfilled and compacted, but that he had no way of knowing that workers would be there because the contractor did not inform the Bureau of any plans to have workers there. Based on this evidence, I conclude that the defendant's agents exercised reasonable precautions in the performance of their duties regarding the excavation.

Id. at 7-8.

These factual findings must be reviewed under the clearly erroneous standard. The court today, however, ignores its obligations as spelled out in *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985), and engages in its own fact-finding in determining that Bureau employees were negligent. Two specific factual findings are the foundation for the district court's findings of negligence. First, until the night of the accident, the night

crew had never worked with whackers in a bridge abutment excavation on this project, although they had used whackers to compact soil around abutments after the abutments had been placed – a later stage of the construction than was involved here. Second, neither Sintek nor Schwisow knew that the night crew would be working in that particular excavation that night. These findings are supported by the testimony of these individuals. Sintek testified that he had never observed a hand-held soil compactor in an excavation area before the placement of a bridge abutment. (Tr. 156). Sintek was never told by any representative of the contractor, Western, that a night shift crew would be working in the excavation that night. (Tr. 176). Schwisow also testified that he had never seen hand-held soil compactors in an excavation area before the placement of a bridge abutment on an abutment footing (Tr. 1144-45), and that he was not informed that night shift would be working in the excavation area that night. (Tr. 1154).[10]

The testimony of Sintek and Schwisow supports the findings of the district court. Insofar as there may have been differing testimony, the district court had the responsibility of resolving the conflicts. *Bessemer City* makes clear that "[t]he reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court." 470 U.S. at 573. "If

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[10] The court's discussion that compactors had been seen in the excavations at night in irrelevant in view of the clear testimony and finding that compactors had never been used until the abutments were in place, a step much later in the process than the one concerned here.

the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 573-74.

The court today ignores these mandates and reduces the eight-day trial before the district court to nothing more than a " 'tryout on the road.' " *Id.* at 575. The detailed discussion of the evidence in this court's opinion, slip op. at 12-14, demonstrates that the majority is making its own factual analysis and abandoning its responsibility to apply the clearly erroneous standard to the district court's findings. To do so is error.

I further take issue with the court's discussion of the discretionary function exception. The district court in its earlier order, on motion for summary judgment, held that the discretionary exception did not apply. In its later order following the trial, it is evident that the court analyzed the testimony in a far more detailed and fact-specific way. The district court did not give further consideration to the discretionary function exception based upon the more fact-specific inquiry at trial. The issue was not raised on appeal by the government. I believe the court's discussion today is unnecessary. In view, however, of the reversal, I believe that it would be appropriate for the district court to reexamine the issue of the discretionary function exception on the basis of the expanded factual record and findings. I believe a close examination

will show that the facts of the second *McMichael* decision are distinguishable from the facts of this case.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DENNIS MURDOCK, et al., Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant and Third-Party Plaintiff, WESTERN CONTRACTING CORPORATION, Third-Party Defendant.	CV86-L-492 MEMORANDUM ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, AND DEFENDANT AND THIRD PARTY PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (Filed Nov. 30, 1988)

The parties agree that the United States, through the Bureau of Reclamation, contracted with Western Contracting Corp., ("Western") in September of 1981 for the construction of the Mirdan Canal, near Burwell, Nebraska. One of the plaintiffs, Dennis Murdock, who was employed by Western, was a member of the night-shift crew who worked on the project. On or about June 12, 1985, as Murdock was operating a hand-held mechanical dirt compactor to fill soil in and around the concrete canal lining, a portion of the canal lining wall collapsed. Parts of the wall and other debris buried Murdock in the excavated trench in which he was working, pinned the mechanical compactor against his body, and as a result, Murdock sustained serious bodily injuries. The land upon which Murdock was working was owned by the United

States, and the trench in which he was working had been excavated by employees of Western.

Murdock, his wife, Sharon, and their child, Shawn, commenced this suit against the United States under the Federal Tort Claims Act on the theory that the government owned and was in control of the premises at the time of the accident and that the government's negligence in failing to assure Western's adherence to safety standards caused Murdock's injuries. In its answer, the United States denied that it, or any of its agents, acted negligently. Thereafter, as a third-party plaintiff, the United States sued Western, alleging that Western's negligence and/or the negligence of Murdock caused Murdock's injuries. Both the defendant and the plaintiffs seek partial summary judgments.

The United States' motion for a partial summary judgment is premised on the legal conclusion that the government cannot be held responsible under the FTCA for the negligence of a party with which it has an independent contractual relationship, nor can it be held responsible under the FTCA on a theory that it owed a nondelegable duty to Murdock because, it argues, the nondelegable duty doctrine is based in vicarious or strict liability. The defendant has moved for summary judgement as to all claims alleged in the complaint at paragraphs 7(b)-(h), which include all of the specific allegations of the government's negligence with one exception. The United States does not seek summary judgment on the plaintiffs' allegation that the United States failed to exercise due care in properly designing the concrete canal so as to prevent collapse form excavation.

The Murdocks' arguments in support of their amended motion for a partial summary judgment against the United States are the same arguments, in part, that they assert in opposition to the United States' motion. The plaintiffs' claim that the United States is liable to the plaintiffs as a matter of law because Nebraska law imposes a duty on a private owner of land, who hires an independent contractor and who retains control of the work performed by the independent contractor, to protect the contractor's employees from injuries suffered while work is being performed on the owner's land. Additionally, the plaintiffs' argue that the United States is precluded from pursuing the defenses of contributory negligence and assumption of risk against them.

The action is brought under the Federal Tort Claims Act, 28 U.S.C. § 1346(b). The Act subjects the United States to liability "for injury or loss of property, or personal injury or death caused by the negligent or wrong act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred." *Id.*

WAIVER OF IMMUNITY UNDER THE FTCA

The government maintains that it may not be held liable under the nondelegable duty doctrine because the terms of the FTCA do not extend the government's waiver of sovereign immunity to claims based on an independent contractor's negligence or to claims based upon strict or vicarious liability. The government asks the

court to recognize that the government's waiver of immunity under the FTCA is limited to the negligent or wrongful acts and omissions of any "employee of the Government," and that Western, as an independent contractor, was not an "employee of the government" under the FTCA. Additionally, the defendant urges the court to reject the plaintiffs' theory that the government is liable under the nondelegable duty doctrine because that doctrine is based on strict or vicarious liability for which the Act does not waive liability.

The Murdocks' contend that, in failing to maintain a safe working environment, the government breached its duty to the plaintiff and that the alleged negligence of the independant contractor has nothing to do with the separate and distinct negligence of the government. For the purpose of resolving whether the claims may be pursued under the FTCA, I shall assume that under Nebraska law, a private owner of real estate who employs an independent contractor to perform work on his land and who retains control of the work may be held liable for injuries sustained by an employee of the contractor. Assuming the existence of this rule, I shall consider whether the government may be held liable under the FTCA in damages for the breach of its duty under the doctrine.

Authorities are split on whether recovery based upon a state's adoption of the nondelegable duty doctrine is permissible under the FTCA. The defendant ardently relies upon two cases, *United States v. Page*, 350 F.2d 28 (10th Cir. 1965) and *Smith v. United States*, 674 F. Supp. 683 (D. Minn. 1987) in support of its arguments. In *Page*, the government successfully appealed from a judgment entered in favor of the plaintiff. The plaintiff had sued the

government for damages under the FTCA following an explosion that killed Stanley Page at a facility used to manufacture solid fuel propellants for experimental rockets that were to be used by the United States. The Tenth Circuit found that Utah law espoused the principle articulated in § 427 of the Restatement (Second) of Torts:

> One who employs an independent contractor to do work which is inherently dangerous to others is subject to liability for bodily harm caused to them by the contractor's failure to exercise reasonable care to prevent harm resulting from the dangerous character of the work.

Describing the principle sought to be applied as the "doctrine of nondelegable duty," the *Page* court found that an independent contractor is not an employee and thus cannot be liable under the FTCA. *Page*, 350 F.2d at 33-34. The court found that: "liability under this theory is not predicated on actual control or interference exercised or reserved by the United States, and the record shows there was none. Rather, the duty imposed upon the United States, if any, stems entirely from the nature of the activity and the hazards it creates to third persons." *Id.* at 33.

The district court in *Smith* found that the plaintiff, a real estate agent, was not entitled to a recovery from the United States under the FTCA for reasons similar to those used by the *Page* court. While inspecting a house owned by the Department of Housing and Urban Development, the plaintiff fell on a stair and sustained injuries to her leg. HUD had vested responsibility for supervision and maintenance of the house with an area management broker pending the sale of the house. The plaintiff argued

that even though the broker was an independent contractor, Minnesota law imposed a nondelegable duty upon the government to properly maintain the HUD property. *Smith*, 674 F. Supp. at 686. Rejecting the nondelegable duty argument, the district court stated:

> [T]he FTCA 'precludes the imposition of liability if there has been no negligence . . . on the part of the Government.' Thus, . . . strict or vicarious liability [can]not be imposed on the government under the FTCA.

Id. at 686 (quoting *Laird v. Nelms*, 406 U.S. 797, 799 (1972)). The *Smith* court also relied on the holding from *Dumansky v. United States*, 486 F. Supp. 1078, 1093 (D.N.J. 1980).

The *Dumansky* court held, in part, that the doctrine of nondelegable duty cannot impose liability on the Government under the FTCA. The court gave two reasons: "[f]irst, the doctrine is predicated on strict liability for which the FTCA will not support a claim. Second, the doctrine imposes liability on the basis of an independent contractor's negligence; liability on this basis is excluded by the FTCA." *Id.* Though the principles articulated by the *Page*, *Smith*, and *Dumansky* courts provide one analysis of the issue, I find that it is not the approach adopted by the Eight Circuit and, therefore, I am not inclined to follow it.

The Ninth Circuit, in *Gardner v. United States*, 780 F.2d 835 (9th Cir. 1986), held that under California's nondelegable duty doctrine, the government was directly liable for its own negligence. The court stated:

> [I]n *Borquez v. United States*, 773 F.2d 1050, 1053 (9th Cir. 1985), we held that the government

> may be liable under the Tort Claims Act for a breach of a nondelegable duty. The phrase 'nondelegable duty' suggests a type of vicarious or strict liability, but we explained in *McGarry v. United States,* that:
>
> > liability for breach of such [nondelegable] duty is neither strict nor vicarious liability. It is not liability for the contractor's failure to exercise due care or to employ proper safety precautions. Its [sic] stems from the duty of the contractor's employer to exercise reasonable care to see that the contractor abides by his responsibilities in that respect.

Id. at 837-38. I conclude that the Ninth Circuit properly identified the function of the nondelegable duty doctrine and demonstrated that the doctrine is not rooted in strict or vicarious liability.

The Eighth Circuit's decision of *McMichael v. United States,* 751 F.2d 303 (8th Cir. 1985), in which several plaintiffs filed complaints seeking damages for deaths and injuries that were caused by an explosion at a United States munitions dump, provides additional guidance to me. The Eighth Circuit found that Arkansas had adopted a nondelegable duty doctrine in the form of the Restatement (Second) of Torts § 414, and had imposed liability under that section against an employer of an independent contractor who had retained control of the contractor's work. The *McMichael* court determined that the government had exercised sufficient control over the independent contractor's work to justify the imposition of a duty upon the government to the workers. The court observed that:

> [O]ther FTCA cases . . . hold that one who hires an independent contractor to do extra-dangerous or ultrahazardous work has a duty tc exercise reasonable care to see that the contractor takes proper precautions to protect those who might sustain injury form the work. This liability may be imposed on the United States as an employer, and it is not vicarious or strict liability, but rather a function of the employer's own negligence.

Id. at 310. (citations omitted). In accordance with the Eighth Circuit, I conclude that the FTCA waives the government's sovereign immunity sufficiently to permit recovery based upon a breach by the government of a nondelegable duty. If the duty cannot be delegated, then it is the negligence of the United States in allegedly failing to exercise reasonable care to ensure a safe workplace that is the focus of the inquiry. Inasmuch as the defendant's motion for partial summary judgment relies on these grounds, I shall deny its motion.

NEBRASKA'S NONDELEGABLE DUTY DOCTRINE

Having found that a claim based upon the government's failure to perform a nondelegable duty may be pursued under the FTCA, I shall undertake to define the scope of the nondelegable duty doctrine that has been adopted by the Nebraska Supreme Court so that I may answer some of the plaintiffs' arguments in favor of their motion. While the case law establishes that some form of the doctrine has been adopted, the same cases confuse the scope of the doctrine and, therefore, they warrant consideration.

The plaintiff's rely primarily on the Nebraska court's analysis and holding in *McKinstry v. County of Cass*, 228 Neb. 733, 424 N.W.2d 322 (1988) to support their assertion that Nebraska has adopted a broad nondelegable duty doctrine. The plaintiff in that case was the wife of Eugene McKinstry, who was killed when a trench in which he was working collapsed and buried him. The property upon which McKinstry was working was owned by the county. The county had contracted with a general contractor who subcontracted with Weweldit, McKinstry's employer, to build a bridge. The facts of *McKinstry* are amazingly similar to those facts alleged in the Murdock's complaint to this point. However, the county in *McKinstry* performed the work of, and undertook all responsibility for, excavation of the trench. In so doing, the county used its own equipment and employees.

The *McKinstry* court initially determined that negligence permeated the excavatory work and next proceeded to determine which party was responsible for the negligence. *Id.* at 744, 424 N.W.2d at 329. After discussing the ramifications of *Hickman v. Parks Construction Co.*, 162 Neb. 461, 76 N.W.2d 403 (1956) and *Erickson v. Monarch Industries*, 216 Neb. 875, 347 N.W.2d 99 (1984), the *McKinstry* court concluded that the county had a nondelegable duty to use due care to protect persons against injury from the hazards or risks which inhered to the particular excavation, trenching and earthwork. *Id.* at 744-45, 424 N.W.2d at 329-330.

The plaintiffs argue that the *McKinstry* court's holding was founded upon two grounds: first, that the county had actually performed the excavation, and second, that, as the landowner, the county possessed an independent

nondelegable duty to provide Murdock with a safe place to work. They ask this court to study the precedent upon which the Nebraska court relied to reveal the strength of the nondelegable duty doctrine which the court has adopted. Having read the cases upon which the parties rely in their briefs, and those cases that are relied upon by the Nebraska court in *McKinstry,* I conclude that an extensive discussion of these precedents will not significantly add to the information provided in the extensive excerpts that are set forth in the paragraphs that follow.

The government challenges the plaintiffs' characterization of *McKinstry* and its predecessors. It argues that the *McKinstry* court emphasized that the county undertook *all* responsibility for excavation and that the county had actually performed the excavatory work. They contend that the court put no stock in the fact that the county owned the property, and that the plaintiffs' attempt to convince the court otherwise is misguided. Though discussion of the nondelegable duty doctrine appears in the *McKinstry* opinion, the government asserts that the opinion's holding cannot be separated from the court's finding that the county was solely responsible for the excavatory work.

In addition to recharacterizing the analysis and holding of *McKinstry,* the government's opposition to the plaintiffs' motion consists largely of the Nebraska Supreme Court's opinion in *Sullivan v. Geo. A. Hormel & Co.*, 208 Neb. 262, 303 N.W.2d 476 (1981). The government argues that the facts of *Sullivan* are more akin to the facts presented in this case than are the facts of *McKinstry.* The United States contends that the *Sullivan* court relied upon the language in the contract between the owner and the

general contractor in finding that the relationship between them never converted into that of master and servant, and therefore, that the owner could not be liable for the negligence of the contractor.

The *Sullivan* court though quoting extensively from the contract, also emphasized that the evidence showed that the owner did not retain control of the premises and that it did not assume responsibility for safety measures. *Id.* at 270. The court also observed that in analyzing the relationship between an owner and an independent contractor, "[t]he emphasis is on the term 'independent,' not on the term 'contractor' ". *Id.* The defendant's reliance on *Sullivan* ties into its argument that the FTCA does not waive immunity where the relationship is between the owner and the independent contractor, but that it waives immunity for an employee-employer relationship.

An understanding of the *McKinstry* court's analysis is important to the resolution of these motions. Therefore, I shall quote extensively from the *McKinstry* decision in an attempt to establish the extent of Nebraska's so-called "nondelegable duty doctrine." Quoting from *Erickson, supra,* the *McKinstry* court stated:

> [The contractor] contends that it cannot be held liable for the negligence of [the subcontractor]. [The contractor] relies on the general rule that the employer of an independent contractor is not liable for physical harm caused to another by the act or omissions of the contractor or his servants. *Sullivan v. Geo. A. Hormel and Co.*, 208 Neb. 262, 303 N.W.2d 476 (1981). There are exceptions to this rule of nonliability. The general contractor remains liable for the negligence of the subcontractor "if he retains 'control' of

> the work – or if, by rule of law or statute, the duty to guard against the risk is made 'non-delegable'." *Funk v. General Motors Corp.*, 392 Mich. 91, 101, 220 N.W.2d 641, 645 (1974).
>
> In the [*Erickson*] case [the contractor] had a nondelegable duty to provide a facility which was safely wired. "The nondelegable duty exception is based upon the theory that certain responsibilities of a principal are so important that the principal should not be permitted to bargain away the risks of performance." *Arsand v. City of Franklin*, 83 Wis. 2d 40, 54, 264 N.W.2d 579, 586 (1978) at n. 8.
>
> The nondelegable duty exception to the rule of nonliability was described by the court in *Witucke v. Presque Isle Bank*, 68 Mich. App. 599, 610, 243 N.W.2d 907, 912 (1976): "[W]e believe that an essential element of the doctrine is the failure of the principal to see that all appropriate precautions are taken by the one to perform the inherently dangerous task. The doctrine, in short, says that the principal is negligent, and hence liable, because it has allowed the independent contractor to be negligent in performing the job. There is a nondelegable duty to see that the work is done with the requisite degree of care; when the contractor fails in fulfilling its duty of care, the principal has breached its own precautionary duty."

McKinstry, at 741-42, 424 N.W.2d at 327-28 (quoting *Erickson v. Monarch Industries Inc.*, 216 Neb. at 879-80, 347 N.W.2d at 105 (1984).

In opposing the plaintiffs' motion, the government exerts much energy to distinguish the various Nebraska cases upon which the plaintiffs rely. The government

distinguished the facts of *Erickson* by noting that the *Erickson* court held a contractor liable for the negligence of a subcontractor and that the issue of the owner's liability was not considered. I observe that the general contractor in *Erickson* was employing a subcontractor that was an independent contractor, just as the United States employed Western, an independent contractor.

This court has stated that Nebraska recognizes "a duty upon persons who own or who are in control of an operation which may be dangerous to take suitable precautions to protect people who may be anticipated to be rightfully on the premises." *Davis v. United States*, 395 F. Supp. 793, 796 (D. Neb. 1975). This statement was made after *Hickman*, but prior to the decision of *Erickson* and *McKinstry*.

After considering all the case law and arguments provided by the parties, I find that Nebraska's general rule regarding an owner-employer's liability is that an employer of an independent contractor is not legally responsible for harm caused to another by an act or omission of the contractor or the contractor's employees. *Id.* However, I also conclude that the Nebraska Supreme Court has recognized two main exceptions to the rule of nonliability that were neatly summarized by the *McKinstry* court:

> The general contractor remains liable for the negligence of the subcontractor 'if he retains "control" of the work – or if, by rule of law or statute, the duty to guard against the risk is made nondelegable.

Id. Cases such as *Hickman* and *Erickson* and to a great extent *McKinstry*, have employed the second exception in recognizing the employer's duty to guard against certain risks. *See Hickman*, 162 Neb. at 469, 76 N.W.2d at 409 (imposing liability on general contractor, rather than the premises manager, for failing to protect persons against harm inherent in an excavation performed by the contractor); *Erickson*, 216 Neb. at 879, 347 N.W.2d at 106 (imposing liability on general contractor for injuries caused to subcontractor's employee for the general contractor's failure to provide a facility that was safely wired) and *McKinstry*, 228 Neb. at 745, 424 N.W.2d at 329-30 (imposing liability on county, who performed excavation, for failing to take precautionary measures against harm from the trench's inherently dangerous condition.

EXCEPTIONS TO THE RULE OF NONLIABILITY

The plaintiffs argue that the United States should be held liable for Murdock's injuries under each of the exceptions to the general rule of nonliability. The Murdocks appear to argue that their safe place to work theory falls within the ambit of the exception to nonliability available either when the employer retains sufficient control over the project for the duty to have fallen upon it, particularly when the mishap involves an extra-dangerous activity, or when the employer is the owner of the land upon which the mishap occurred. Although I attempted to separate the arguments under these theories for discussion, I have discovered that under Nebraska's rule of law, the two are inextricably combined. In order to

simplify this analysis, I shall consider the plaintiffs' theories of recovery under the exceptions to the rule of nonliability in the following order: first, as to the nondelegable duty imposed under Nebraska case law; second, as to the duty imposed pursuant to the owner's retention of control over the project; and third, as to the nondelegable duty allegedly imposed under Nebraska statutes.

1. Rule of Law

The plaintiffs contend that under the rule of law in Nebraska, a nondelegable duty is imposed upon the owner of land to take precautionary measures to insure the safe excavation of trenches on the owner's land because trenching is an ultrahazardous activity. Pursuant to this rule, the plaintiffs argue that the Bureau, in its capacity as owner of the premises, owed Murdock a duty to provide him with a safe place to work.

The plaintiffs note the Nebraska Supreme Court's discussion of the rule from *Hickman, supra.* The court stated:

> The general rule which governs where a party is responsible for a dangerous place, agency, instrumentality, or operation likely to cause injury or damage to persons or property rightfully in its proximity, is that he is charged with the duty of taking due and suitable precautions to avoid injury or damage to such persons or property, and his failure to take such precautions constitutes negligence.

Hickman, 162 Neb. at 469, 76 N.W.2d at 409. The court also stated that the person on whom the duty devolves is not

excused from taking the necessary precautions by contracting with or relying on other [sic] to take necessary precautionary measures." *Id.* at 470, N.W.2d at 409-10. The *Hickman* court found that the contractor could not be relieved from its responsibility to protect against the danger from an open excavation by relying upon the manager of the premises, where there was no evidence that the manager had ever exercised control over the project area. *Id.*

Citing to McKinstry for support, the plaintiffs maintain that the Nebraska court, under the principles articulated in *Hickman,* has imposed liability on the owner of premises upon which ultrahazardous activities have been performed. The plaintiffs' restatement of the *McKinstry* court's holding is not altogether accurate. The holding was founded upon the fact that the owner, the county, had performed the excavation, and upon the fact that excavation and trenching are ultrahazardous activities that require a heightened duty of care.

The plaintiffs also rely upon *Simon v. Omaha Public Power District,* 189 Neb. 183, 202 N.W.2d 157 (1972), in arguing that Nebraska law imposes a duty upon a landowner to provide workers on the owner's premises with a safe place to work while construction is in progress. The plaintiff in *Simon* was working as a steamfitter for an independent contractor which was performing work for the Omaha Public Power District when he fell through an opening in the floor of a building that was under construction for OPPD. OPPD was the owner of the premises as well as its own general contractor. In distinguishing the *Simon* holding from other cases, the Nebraska Court has noted that OPPD let no contract for the construction

of the building at issue in that case, but instead hired an agent, an architect, to supervise the various stages of construction. *See Sullivan*, at 269, 303 N.W.2d at 480. Thus, liability was not imposed on OPPD solely as the premises owner, but also as the party that retained control of the project.

It is apparent to me that under Nebraska law the duty to provide Murdock with a safe place to work rests with the party upon whom the duty devolved. Whether the duty devolved upon Western or upon the United States, according to *McKinstry* and *Simon*, may be answered by determining who had control over the work. Such a conclusion necessarily ushers me into the discussion of the exception to the rule of nonliability for those who retain control of the work. Therefore, I turn to the plaintiffs' contention that the United States never actually relinquished control of the construction project to Western, and therefore, the United States owed Murdock a duty to provide to him a safe place to work.

2. Retention of Control

In terms of calculating the amount of control exercised over a project, the Nebraska Supreme Court has found that an owner's actual performance of an ultrahazardous activity and the owner's decision not to retain a general contractor constitute sufficient control over the project to bring the owner's duty within the exception to the rule of nonliability. *See McKinstry and Simon, supra.* On the other hand, the court has also demonstrated that if the owner exercises no control over the project or if the owner assumes no responsibility for safety measures,

then there is insufficient control exercised by the owners. *See Hickman and Sullivan, supra.* The facts presented of this case refuse to fall easily into one category or the other. Therefore, I shall look to federal cases of a similar nature to lend definition to this gray area.

The test in the Eighth Circuit for determining whether an owner retained sufficient control appears to be a factual matter. In *McMichael v. United States,* 751 F.2d 303, 309 (8th Cir. 1985), the court applied the rule from the Restatement (Second) of Torts §414, which the court determined would have been applied by the Arkansas Supreme Court. That section states:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Id. Under the *McKinstry* decision discussed above, I conclude that the requirements of section 414 and the requirements of the developing rule of law in Nebraska require the same basic determinations. Ownership alone is insufficient; the owner must also retain some control over the project. The Eighth Circuit found that the Department of Defense retained sufficient control over an independent contractor to warrant consideration of the negligence issue. The court stated:

> Very few cases concerning the liability of private employers of an independent contractor involve the level of control which the government had here. The distinctive factors in our application

> of Arkansas law to the instant case are: 1) the hiring of an independent contractor to perform ultrahazardous work; 2) promulgation of detailed safety requirements and incorporation of them into the contract; 3) express reservation of continuous inspection authority to ensure compliance with these requirements; 4) the continuous presence of three government inspectors on the job for the explicit purposes of insuring compliance with safety and quality requirements; and 5) the failure to perform the required inspections or to take action when violations were observed.

Id. at 309-10.

The plaintiffs also direct my attention to *Barron v. United States*, 473 F. Supp. 1077 (D. Haw. 1979). In that case, the contract required the independent contractor to take proper safety precautions while performing the work, particularly the earthwork and trenching. The court found that the contractor had displayed a general and continuous disregard for the contractual safety requirements and that the Navy was aware of the disregard but that it took no action other than to warn the contractor. The derelictions of the contractor began approximately one month after the contract began, in September of 1975, and continued until the time that the plaintiff was injured in June of 1976.

The court concluded that Hawaii law would impose a duty upon an employer "to provide a safe place to work" and that the duty would run to whomever the owner required or permitted to perform work on his premises. From Hawaii case law, the court determined that Hawaii would follow other states that have imposed liability on

an owner for permitting a contractor to conduct ultrahazardous activities without taking proper precautions.

The court found that the Navy had been aware of the unreasonable risks presented by the contractor for months; that the Navy had been aware of alternatives available to it such as stopping work, suing for breach of contract and others; and that the Navy knew of the ultrahazardous nature of the trenching work. Although the court found that under the contract, the primary duty to provide for safety of the workers rested with the contractor, the court determined that the Navy reserved general control of the work and that the Navy had a substantial staff to oversee it. Based upon all of these findings, the court concluded that the United States could be held liable for the injuries of the employee. *Id.* at 1084.

The government argues that the amount of control and the continuous nature of the control that the government exercised over projects in *McMichael* and *Barron*, distinguish those cases from the ordinary case, such as the one presented here. Among other cases, the government cites to *Johnston v. United States*, 461 F. Supp. 991 (D.N. Fla. 1978) wherein the court observed that contractual obligations alone; the retention of the right to inspect or actual inspection alone; the retention of the right or the undertaking to require adherence to safety regulations alone; or the issuance of regulations or a manual for a safety program alone demonstrate insufficient control over a project to justify the imposition of liability upon the government. *Id.* at 993 (citations omitted). The *Johnston* plaintiff sued for injuries that he sustained as a result of falling through a scaffolding. The *Johnston* court found that "[m]ere approval of, or acquiescence in, the design of

the scaffold here by the government inspector would be insufficient to impose liability upon the United States." *Id.*

The government also relies upon the *Page* and *Smith* opinions, *supra*, to support their argument. The *Page* court noted that there must be affirmative control and direction by the government over employees so "as to create conditions where there was in fact no independent contractor." *Page*, 350 F.2d at 31. The *Smith* court stated that the issue is whether the government controls the detailed physical performance of the contractor, and the court found that heavy regulation by the government is not sufficient involvement. *Smith*, 674 F. Supp. at 685-86.

The evidentiary material before me indicates that the Bureau hired Western, in part, to perform ultrahazardous work and that the Bureau and Western included safety standards in the contract. Defendant's exhibit F. The safety provisions incorporate the Bureau's detailed Construction Safety Standards manual into the agreement. *See* exhibit 4. The government also retained the right to inspect, *see* Defendant's exhibit C, and in fact did inspect the work areas on a daily basis for violations of the safety standards. *See* exhibit 1 to the Deposition of Mark Sintek, dated March 14, 1988. Moreover, the inspectors were empowered to, and on occasion did, stop work in order to force compliance with safety regulations. *See* inspection reports dated 4-5-85, 4-6-85, 4-11-85, and 6-1-85 in exhibit 1 to Sintek deposition and 68:13-23, 69-12-20. The evidence also showed that the decision to remove a portion of the curb above the excavations was made by a government employee, Robert McClure. Deposition of Robert McClure at 42:13-26:24. Further, a government

inspector, Richard Schwisow, was at the site on the day of the mishap and saw that there was a problem with the excavation and yet told no one about it. *See* exhibit 1 to Sinek deposition, report dated June 12, 1985.

I also note, however, that the government did not actually perform the excavatory work and that the parties included in the contract that it was primarily Western's duty to bear responsibility for worker safety. Defendant's exhibit F. Further, I have seen no evidence to demonstrate that the government intended to maintain control over the details of the entire construction project.

Though the judgment is a difficult one to make, I conclude that the facts indicate that the Bureau retained sufficient control over the Mirdan Canal project to justify the imposition of a duty upon it to Murdock to provide him with a safe place to work. Concluding that the Bureau owed Murdock a duty does not translate into liability. Therefore, I undertake to consider the defendant's argument that they are protected under the discretionary function exception to the FTCA.

DISCRETIONARY FUNCTION

In an attempt to narrow the issues of negligence that I must address, I shall consider the defendants' argument that it is protected under the discretionary function exception to the FTCA. I have little trouble answering the defendant's concerns, given the recent decision of *McMichael v. United States*, 856 F.2d 1026 (8th Cir. 1988). The *McMichael* court stated that in determining whether a decision is protected under the discretionary function test, a court must "first consider whether the action is a

matter of choice for the acting employee; conduct cannot be discretionary unless it involves an element of judgment or choice." *Id.* at 1031. The McMichael court stated that the court must then consider "whether that judgment is of the kind that the discretionary function exception was designed to shield. *Id.* at 1032. "[T]he basis for the exception was Congress' desire to 'prevent judicial "second guessing" of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort." *Id.*

As mentioned previously, the *McMichael* case was initiated by persons who were injured or who represented persons who had died in an explosion that occurred in a plant used to manufacture photo flash cartridges. The manufacturer, Celesco, was under contract to supply the cartridges to the Department of Defense. The *McMichael* court stated:

> Certainly, the Defense Department's decision to entrust Celesco with the primary responsibility of ensuring that it complied with safety regulations and supervising plant safety involved the permissible exercise of policy judgment and is protected by the discretionary function exceptionn [sic]. . . . However, . . . the discretionary function exception does not apply to acts which do not involve the permissible exercise of discretion.

Id. at 1033. The Eighth Circuit determined that the Defense Department's inspector failed to evacuate the plant on the occasion of an approaching thunderstorm and that the specific procedures for doing so had been mandated by the department. Because the inspectors had

no choice but to follow the department's policy directives, the court concluded that the discretionary function exception to the FTCA would not exempt them from liability for their actions. The court came to this conclusion even though the government argued that when a safety violation was detected, the inspectors had a choice of ordering a variety of corrective measures. The court expressly responded to the argument in finding that "the inspector was explicitly directed in the event of an electrical storm to ensure that the contractor evacuated the plant." *Id.* at n. 8.

According to *McMichael*, I must determine if any of the actions that were taken, or that should have been taken and were not, by the Bureau's employees were matters in which the employee actually had no choice under the Bureau's directives. The fact that stands out from the others is that Schwisow failed to stop the work early in the day at the site where the accident later occurred. Mark Sintek testified that he had warned the workers of the unsafe depth of the excavation and had informed Schwisow, Sintek's supervisor, of the problem. Deposition of Mark Sintek, March 3, 1988, at 38:2-40:17. In his June 6, 1985, report, Schwisow states that he observed a front-end loader excavating several feet below the necessary 8.5 feet and that he noted that the material under the unenforced lining was excavated to approximately four feet.[1]

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[1] The report stated, in part:

On June 12, 1985, during my daily inspection tour of the Mirdan Canal, Section 1, at approximately 3:00

(Continued on following page)

Schwisow's duties as described by the Bureau are listed in exhibit 1 to Sintek's deposition. In part, the description of the supervisory construction inspector's duty reads: "[s]upervises on-site safety program involving both the Bureau and contractor's operation. Assures that the inspection forces are properly advised and all unsafe conditions or practices are corrected immediately." I find that the language of this description uses explicit language that is similar to the language in the direction that the *McMichael* inspector was to follow.

(Continued from previous page)

p.m., I stopped by station 372+74 county road bridge site. I observed a front-end loader excavating the left abutment after a failing test. I asked a laborer that was watching this operation if they knew that they only needed to excavate 8.5 feet below the top of the lining. He said yes, but it appeared that the front-end loader operator was below this several feet. At this time, the material under the 1 1/2:1 unreinforced lining was excavated out to about four feet below the top of the lining on about 1/2:1 slope. (see drawing).

I left the area and tried to find Rick Everist who was in charge of this operation but could not locate him. Mark Sintek said he had talked to the people about this being excavated too deep but nothing was done to change the operation.

Another problem that the contractor had with the excavation was that the detour road was too close to the excavation and could not be moved over due to a 12-inch irrigation crossing just downstream of the bridge site. After the accident, the detour was moved. . . .

Therefore, I conclude that the decision made by Schwisow is not protected under the discretionary function exception to the FTCA.

Having arrived at this conclusion, the next issue that must be decided is whether Schwisow's failure to follow the duty that was imposed upon him as an employee of the Bureau constitutes negligence. Although Schwisow's report indicates that he believed the trench workers' activities to be problematic, it is unclear whether he also felt that the activities were unsafe and there is a genuine issue of material fact whether the excavation at that time was unsafe. Whether Schwisow used reasonable care in failing to take immediate action to correct a condition that was at least problematic, is a question of fact that I cannot answer here. Therefore, I shall not grant either party's motion for summary judgment on this issue. I turn my attention to the plaintiffs' third argument, that they are entitled to relief under the exception to the nonliability rule for nondelegable duties that are statutorily mandated.

3. Statuory [sic] duties

The plaintiffs also contend that the government is liable under statutory duties imposed by Neb. Rev. Stats. §48-425 and §48-433. Section 48-425 reads, in part:

> All scaffolds, hoists, cranes, stays, ladders, supports or other mechanical contrivances used in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct or other structure, shall be erected and constructed in a safe, suitable and proper manner.

The plaintiffs argue that the dirt that Murdock was compacting constitutes a "support" and that the canal lining constitutes a "structure" for purposes of the statute. Though the canal lining may well be a "structure" under the statute, a reading of the entire statute tends to show that dirt is not the type of "support" that the drafters of the statute contemplated. I conclude this in part because the other instrumentalities that are listed in the statute are mechanical and the catch-all provision includes "other *mechanical* contrivances." *Id.* (emphasis added). Further, the statute also directs that the instrumentalities "shall be erected and constructed" with care. It would require an extremely liberal reading of "support" or a set of facts that are much more peculiar than those presented here to conclude that dirt is an instrumentality that is capable of being "erected and constructed" in a way that was contemplated by the drafters. After having read the statute and several cases in which the statute was discussed, I conclude that the statute does not apply to the allegations presented in the complaint, and the plaintiffs' reliance upon it is unfounded.

The plaintiffs also contend that Neb. Rev. Stat. §48-433 defines a nondelegable duty, the breach of which has rendered the United States liable to Murdock. The statute reads:

> All architects or draftsmen in preparing plans, specifications or drawings to be used in the erection, repairing, altering or removing of any building or structure within the terms and provisions of sections 48-425 to 48-435, shall provide in such plans, specifications and drawings for all the permanent structural features or requirements specified in said sections. Any

person violating the provisions of this section shall be guilty of a Class IV misdemeanor.

The thrust of the plaintiffs' argument is that the plans, as drawn by government employees had a foreseeable safety defect. The defect, according to the plaintiffs, is that the plans failed to specify that if the canal lining was installed before the bridge abutments, the canal lining would overhang the excavation for the bridge abutment unless portions of the overhang were removed prior to the excavation. The plaintiffs allege that the hazard presented by the overhanging lining could have been avoided had the draftsmen included a sequence of performance in the drawings or specifications.

The government, relying on the affidavit of Walter Long, part of filing 94, contends that sequence of performance was not included in the drawings because, after considering economic and other policy considerations, the Bureau of Reclamation found that inclusion of the sequence was not warranted. Therefore, continues the defendant's argument, the decision not to use a sequence of performance falls within the discretionary function exception to the FTCA.

I need not address the discretionary function issue here because I find that the sequence of performance is not the type of detail that Neb. Rev. Stat. §48-433 was designed to require. I conclude that by its terms the statute does not apply to the facts presented in this case. The statute requires that architects and draftsmen provide in their plans, specifications and drawings "for all permanent structural features or for the requirements mandated" by sections 48-425 to 48-435. The sequence of

performance cannot be termed a "permanent structural feature" nor can I find a requirement for the inclusion of a sequence of performance in sections 48-425 to 48-435. Accordingly, I agree with the defendant, though for a more elementary reason, that section 48-433 does not impose a nondelegable duty upon the United States to have included a sequence of performance in the plans, specifications or drawings.

ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE

Since I have determined that the plaintiffs may not rely upon sections 48-425 or 48-433, I must also reject their argument that section 48-435 applies to their case to avoid the defense of assumption of risk. Moreover, I conclude that material facts are sufficiently at issue to warrant a denial of the plaintiffs' motion as to the United States' defenses. The plaintiffs, referring me to Dennis Murdock's deposition, argue that Murdock was not given any option other than working in the trench which eventually collapsed and the defendant, referring me to foreman Tom Kusek's deposition, argues that no worker was forced to work in an area where the worker was not comfortable. The defendant also points out that Murdock observed the foreman's inspection of the trench before work began and that the foreman had warned Murdock to abandon the hole if there was any sudden movement of dirt within the excavation, and that such a movement was reported to the foreman following the accident. Deposition of Tom Kusek, 40:23-25, 94:23-95:19, 107:15-108:3. Murdock testified that he had no warning of the collapse. Murdock deposition, March 16, 1988 at

96:16. Based on these facts, I shall not grant the plaintiffs' motion for summary judgment as to the issue of the plaintiff's contributory negligence or assumption of risk.

OSHA REGULATIONS

I feel compelled to expressly rule on only one remaining issue that was presented in the defendant's motion for partial summary judgment: whether the government can be sued under the FTCA for its failure to exercise due care to enforce safety standards by which it was bound under OSHA regulations. It is the duty of OSHA inspectors to enforce the safety standards promulgated therein and, based on my reasoning in *Davis v. United States*, 395 F. Supp. 793, 795-97 (D. Neb. 1975), I shall hold that any employee of the Bureau may not be held liable for the failure of OSHA inspectors under the FTCA when such a duty cannot be imposed on any private person. To the extent that this memorandum has explained that the Bureau retained sufficient control of the project, partially through the participation of its safety inspectors, to warrant the imposition of a duty of due care, I make clear here that the duty of the Bureau's inspector is not the same as the duty of an OSHA compliance officer.

Dated November 30, 1988.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DENNIS MURDOCK and SHARON MURDOCK, for themselves, and as parents and next friends of their minor child, SHAWN M. MURDOCK; and EMPLOYEES INSURANCE COMPANY OF WAUSA, A Corporation,	)	CV86-L-492
Plaintiffs,	)	MEMORANDUM OF DECISION
vs.	)	(Filed Mar. 15, 1989)
UNITED STATES OF AMERICA,	)	
Defendant and Third-Party Plaintiff,	)	
v.	)	
WESTERN CONTRACTING CORPORATION, A Corporation,	)	
Third-Party Defendant.	)	

In 1981, the Bureau of Reclamation contracted with Western Contracting Corp., ("Western") for the construction of the Mirdan Canal, near Burwell, Nebraska. One of the plaintiffs, Dennis Murdock, who was employed by Western, was a member of the nightshift crew who worked on the project. On or about June 12, 1985, as Murdock was operating a hand-held, mechanical dirt

compactor to fill soil around a concrete canal lining in a bridge abutment excavation, a portion of the canal lining collapsed. Murdock was buried in the excavation under pieces of the broken liner and other debris, and the mechanical dirt compactor was pinned against his body. As a result of the collapse, Murdock sustained serious bodily injuries. The land upon which Murdock was working was owned by the United States, and the hole in which he was working had been excavated by employees of Western.

Murdock, his wife, Sharon, and their child, Shawn, commenced this suit against the United States under the Federal Tort Claims Act on the theory that the government owned and was in control of the premises at the time of the accident and that the government was negligent in failing to assure Western's adherence to safety standards thereby causing Murdock's injuries. In its answer the United States denied that it or any of its agents acted negligently. Thereafter, as a third-party plaintiff, the United States sued Western, alleging that Western's negligence and/or the negligence of Murdock caused Murdock's injuries. Both the defendant and the plaintiffs sought summary judgment prior to the trial.

In my memorandum on the summary judgment motions, I made several findings based on the evidence that was before me at that time. I determined that Nebraska law recognizes two exceptions to the general rule that an owner may not be liable for the negligence of an independent contractor. One exception to the rule is available when the evidence establishes that the owner retained control over the project. If the owner retained control, then the owner is responsible for providing a safe

workplace. The second exception to the rule applies when by rule of law or by statute a duty of the owner becomes nondelegable. In Nebraska a duty to take due and suitable precautions devolves upon a party who is responsible for a dangerous place, agency, instrumentality or operation likely to cause injury or damage to persons and this duty is nondelegable.

I concluded in my memorandum on the parties' summary judgment motions, filing 102, that the facts before me at that time indicated that the government retained sufficient control over the project to justify the imposition of a duty to provide Murdock with a safe place to work. After reviewing the depositions and the other evidence adduced at trial, I now conclude that my previous determination regarding the extent of the government's control over the project was based on an incomplete view of the pertinent facts.

I referred to relevant portions of the contract in my previous memorandum. The evidence at trial clearly established that the government's detailed construction safety standards were incorporated into the contract and that the contract placed sole responsibility for safety on Western as the general contractor.[1] The contract also

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[1] The contract reads, in part, at paragraph 12 of Standard Form 23-A:

> The Contractor shall, without additional expense to the government, be responsible for obtaining any necessary licenses and permits, and for complying with any applicable Federal, State, and municipal laws, codes and regulations, in connection with the

(Continued on following page)

makes clear that the government retained the right to inspect the contractor's work and that the inspections

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(Continued from previous page)

> prosecution of the work. He shall be similarly responsible for all damages to persons or property that occur as a result of his fault or negligence. He shall take proper safety and health precautions to protect the work, the workers, the public and the property of others.

The specifications state, in part, at 1.1.4:

> a. The contractor shall not require any laborer or mechanic employed in the performance of the contract to work under conditions which are unsanitary, hazardous, or dangerous to his health or safety, as determined under construction safety and health standards promulgated by the Secretary of Labor under section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327), as amended, and "Construction Safety Standards" published by WPRS (Water and Power Resources Service).
>
> b. The contractor shall fully comply with the WPRS "Construction Safety Standards" and amendments or revisions thereto in effect on the date bids are received. This handbook will be provided at no charge for use in connection with the specifications. Construction Safety and Health Standards promulgated by the Secretary of Labor may be obtained from any regional or area office of the Occupational Safety and Health Administration of the U. S. Department of Labor.
>
> . . .
>
> d. The contractor is responsible for being cognizant of and insuring compliance with the requirements

(Continued on following page)

performed by the government inspectors were for the government's benefit alone to ensure that the contractor was complying with the specifications and the other terms of the contract.[2] The evidence also supports the conclusion that the inspectors had no authority to direct the activities of Western's employees, except when inspectors were compelled to stop work at the site for

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(Continued from previous page)

> set forth in subparagraphs a. and b. above. Such responsibility shall apply to both his operations and those of his subcontractors. When violations of the safety and health requirements contained in these specifications or standards referenced in subparagraph a. are called to his attention by the contracting officer or his authorized representatives, the contractor shall immediately correct the condition to which attention has been directed. Such notice either oral or written, when served on the contractor or his representative(s), shall be deemed sufficient.

Exhibit 2.

[2] The contract states at paragraph 10 of Standard Form 23-A, in part:

> (a) All work (which term includes but is not restricted to materials, workmanship, and manufacture and fabrication of components) shall be subject to inspection and test by the Government at all reasonable times and at all places prior to acceptance. Any such inspection and test is for the sole benefit of the Government and shall not relieve the Contractor of the responsibility of providing quality control measures to assure that the work strictly complies with the contract requirements.

Exhibit 2.

safety reasons.[3] This limitation, however, did not stop the inspectors from noting construction violations that related to safety on their daily reports.

The testimony of Bureau employees Mark Sintek, a construction inspector, and Richard Schwisow, Sintek's immediate supervisor, established that the inspectors ordinarily did not issue stop work orders, but rather would informally discuss their concerns about a specific site with the foreman, and the inspector and foreman would voluntarily cooperate to alleviate the inspector's concerns. Western's safety officer and foreman, Richard A. Everist, testified that he did not rely on the Bureau inspectors for their safety advice.

In determining whether the government exercised sufficient control over the project, I also observed in my previous memorandum that the Bureau's Project Construction Engineer for the Mirdan Canal, Robert McClure, stated that the decision to cut the liner was based upon his advice. The greater weight of the evidence at trial did not support McClure's statement that the decision to

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[3] The specifications state in part at subparagraph e.:

> In the event the contractor fails or refuses to promptly comply with the compliance directive issued under subparagraph d. above, the contracting officer or his authorized representative may issue an order to stop all or any part of the work. When satisfactory corrective action is taken, an order to resume work will be issued.

Exhibit 2.

remove the liner's overhanging was based on safety considerations asserted by him in a meeting with James Pinkman, Western's project superintendent.

McClure testified that he, Pinkman, and possibly LeRoy Mack, Western's project engineer, met sometime before the accident at which time Pinkman asked McClure about whether the contractor could lay the liner before the bridge abutments were placed. McClure testified that he told Pinkman that the sequence was workable provided that the overhanging portion was not too long and provided that the earth under the canal gave the liner support. He testified that he told Pinkman that if the lip of the canal lining was longer than 2 to 3 feet, the liner should be removed though they did not discuss how much of the curb should be removed. Pinkman testified in his deposition that he does not recall the conversation with McClure, but stated that he knew that a meeting with Bureau personnel occurred and that Mack attended. He testified that he did not recall any conversations with McClure or any other Bureau employee about safety concerns in regard to cutting the liner.

Although McClure stated that he cannot specifically recall communicating directions to cut the liner to his subordinates, he testified that customarily he would have communicated such instructions. McClure may well have made observations about the safety benefits of cutting the liner. However, Pinkman's statement that the decision to cut the liner before placement of the bridge abutments was his alone detracts from the significance of McClure's involvement.

The evidence established that Western's Pinkman, Mack, and Steve Mathers, the day foreman, and the Bureau's Gary Wilson, the chief of the canal inspection branch, and Cecil Womak, the field engineer, understood that the decision to cut the liner was made to provide Western's workers with sufficient room to work. The above-mentioned witnesses acknowledged that cutting the liner was the usual procedure. Because McClure's role in deciding whether to cut the liner was less crucial than Pinkman's and because both Pickman's and McClure's subordinates believed that the reason for cutting the liner was to give the workers sufficient room to work rather than for safety reasons, McClure's participation does not indicate any significant amount of governmental control over the project.

In determining whether the government's control was significant in my prior memorandum, I also emphasized the fact that Schwisow recognized a "problem" [the characterization provided in Schwisow's report] at the site on the day of the accident and failed to communicate his concerns to Western's foreman. At trial, additional facts were adduced that show that Schwisow's inaction reflected little about the amount of government control over the project because Schwisow's concern was that the crew's efforts were being wasted and not that the hold posed an unreasonable risk to their safety or the safety of others.

Schwisow testified that in response to Sintek's comments to him about unnecessary excavating, he drove to the site and observed a front end loader being operated by a worker in the excavation and another worker on top of the excavation. At the time he observed the hole,

Schwisow stated, he found it to be approximately 12 feet deep. The payline for the excavation was only 8.5 feet deep and Schwisow testified that it was obvious to him that the contractor specifically Rick Everist, did not know what this particular crew was doing. After the worker told Schwisow that Sintek had already informed them that the excavation was exceeding the pay line, Schwisow spent approximately 30 to 45 minutes looking for Everist. Schwisow observed the excavation at the end of the workday, approximately at 4:00 p.m. He testified that he did not find Everist and so he left the construction site for the evening.

The elaboration at trial of the evidence that was presented to me in the motions for summary judgment has persuaded me that the government did not retain sufficient control over the project to justify the imposition of a duty upon it. The facts adduced at trial significantly distinguish this case from *McMichael v. United States*, 751 F.2d 303, 309 (8th Cir. 1985). I relied upon an excerpt from the *McMichael* case in my previous memorandum, which reads:

> Very few cases concerning the liability of private employers of an independent contractor involve the level of control which the government had here. The distinctive factors in our application of Arkansas law to the instant case are: 1) the hiring of an independent contractor to perform ultrahazardous work; 2) promulgation of detailed safety requirements and incorporation of them into the contract; 3) express reservation of continuous inspection authority to ensure

> compliance with these requirements; 4) the continuous presence of three government inspectors on the job for the explicit purposes of insuring compliance with safety and quality requirements; and 5) the failure to perform the required inspections or to take action when violations were observed.

Id. at 309-10. The additional testimony adduced at trial persuades me that the level of control exercised by the government's agents in this case is markedly lower than the excerpt from *McMichael* requires. Because there was insufficient control exercised by the government over the project and the site, I conclude that neither of the exceptions to Nebraska's general rule of nonliability apply in this case.

The plaintiffs may argue that this changed conclusion has prejudiced them, given their reliance upon my previous memorandum. I have considered the ramifications of this change and I conclude that it does not unfairly prejudice them. The greater weight of the evidence indicates, even assuming that the government had control of the project, that the government was not negligent and breached no duty to Murdock. In Nebraska the standard of care required of owners who are in possession and control of the premises upon which a large construction project is in progress is to provide a safe place to work. In *Simon v. Omaha Pub. Power Dist.*, 189 Neb. 183, 193, 202 N.W.2d 157, 164 (1972), the court explained:

> [A] safe place to work requires that the owner in possession and control of the premises should recognize that the work is likely to create during its progress a peculiar risk of physical harm to others *unless special precautions are taken.*

Similarly, the standard of care required of an owner who "is responsible for a dangerous place . . . or operation likely to cause injury or damage to persons rightfully in its proximity" is to take "due and suitable precautions." *Hickman v. Parks Constr. Co.*, 162 Neb. 461, 469, 76 N.W.2d 403, 409 (1956).

Whether the site or the activities in which Murdock was engaged on the night of the accident constituted a "dangerous place . . . or operation likely to cause injury or damage to persons," I need not decide, because, assuming that the activities qualified as extra-dangerous, there is insufficient evidence to warrant a finding that the United States failed to "take due and suitable precautions" to protect Murdock from injury.

C. Alvin Currie, who, pursuant to his duties as the project's safety manager, reviewed contractor's safety plans and investigated accidents, testified that Sintek and Schwisow had the power to stop the work of the contractor's employees, provided the violations of the construction safety standards were sufficiently severe and that the decision to do so was left to the inspector's discretion. The greater weight of the evidence at trial was that neither Sintek nor Schwisow nor any other agent of the government acted negligently.

Sintek testified that he visited the site once or twice in the morning on June 12. He stated that perhaps a couple of feet of the canal lining were undermined in the morning. Sintek returned to the site in the early afternoon and probably measured the excavation at this time. The deepest portion of the excavation was approximately 12 feet deep. On this occasion, there was a front-end loader

in the hole. He thought the slope of the sides of the excavation were about 1:1 or approximately 45 degrees. At this time Sintek told the loader operator that he needed to excavate only 8.5 feet. He called a coworker to inform Rick Everist of the operator's activities; Sintek had no way of contacting Western's foremen directly.

Sintek's last visit to the site on June 12 was around 4:00 p.m. At this time, he observed that the workers were still excavating and the depth had probably increased since it was later in the day. Sintek remembered no significant change in the slopes during this visit. Sintek did not believe that the excavation was a safety hazard, he saw no one with a whacker, and he believed that the excavation was in line with the construction safety standards. After leaving the site, Sintek saw his supervisor, Richard Schwisow, and he told Schwisow that Western's workers had excavated deeper than necessary. Sintek did not recall whether Schwisow said that he would do something about it.

Sintek testified that he did not believe that the workers in the excavation were in imminent danger. The only workers who he saw in or near the excavation were the loader operator and a worker who was watering the walls of the excavation from above the hole. He did not recall ever seeing workers using whackers in excavations in which abutments had not already been placed. He had "eyeballed" the slopes on each of his visits to the site and had found that they were approximatley [sic] 45 degrees. He also attempted to inform Western's foreman of the unnecessary overexcavation and he informed his own supervisor of his concerns about the unnecessary excavation.

Schwisow's testimony, in addition to his testimony recounted above, established that he observed the site at the end of the normal workday and that he had no knowledge that the night crew would be working in that particular excavation that night. There was testimony that the night crew, until the night of the accident, had never worked with whackers in a bridge abutment excavation on this project, although the night crew had previously worked with whackers to compact the soil around abutments after they had been placed.

The testimony also showed that safety inspectors were not assigned to the night crew as a matter of course. The exception to this policy arose when the work that was performed by the night crew had to be ready to go the following morning so that the day crew could begin another task immediately. Wilson, the chief inspector, testified in his deposition that he probably would have assigned an inspector to the night crew had he known that the excavation was to be backfilled and compacted, but that he had no way of knowing that workers would be there because the contractor did not inform the Bureau of any plans to have workers there. Based on this evidence, I conclude that the defendant's agents exercised reasonable precautions in the performance of their duties regarding the excavation.

I also find that the greater weight of the evidence does not support the plaintiffs' position that the defendant failed to exercise due care in designing the canal. I credit the testimony of Walter Long, the chief of the Bureau's civil engineering division, that what was referred to as drawing 220 reflected a proper design. He testified that because the safety regulations are a part of

the contract, there is no reason to include a sequencing of work in the construction drawings. The Bureau's goal is to provide the contractor with as much discretion in the actual construction of the project as is feasible. Long also clarified that a "payline" represents the amount of excavation for which the government will pay under the contract and that paylines are not intended to be indicative of excavation lines.

Though it need not be decided, I observe that the evidence established that Murdock was negligent. I refrain from deciding whether the extent of his negligence would be sufficient to bar his recovery.

Inasmuch as no recovery is to be had against the United States, no recovery by the United States against Western is warranted.

Dated March 15, 1989.

BY THE COURT

/s/ Warren K. Urbam
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DENNIS MURDOCK and SHARON MURDOCK, for themselves, and as parents and next friends of their minor child, SHAWN M. MURDOCK; and EMPLOYEES INSURANCE COMPANY OF WAUSA, A Corporation,	)	CV86-L-492
Plaintiffs,	)	JUDGMENT
vs.	)	(Filed Mar. 15, 1989)
UNITED STATES OF AMERICA,	)	
Defendant and Third-Party Plaintiff,	)	
v.	)	
WESTERN CONTRACTING CORPORATION, A Corporation,	)	
Third-Party Defendant.	)	

For the reasons stated in the accompanying memorandum,

IT IS ORDERED:

1. that judgment is entered on behalf of the defendant, the United States;

2. that the third-party complaint is dismissed as to Western Contracting Corporation; and

3. that the plaintiffs' motion to reconsider the entry of summary judgment in favor of the defendant on the plaintiffs' claim based on Nebraska statutory law is denied.

Dated March 15, 1989.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

APPENDIX F

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 89-2303NEL

Dennis Murdock, et al.,	*	
Appellants,	*	Order Denying
	*	Petition for
vs.	*	Rehearing and
	*	Suggestion for
United States of America, et al.,	*	Rehearing En Banc
Appellees.	*	

We have before us a filing styled "Petition Entered for Rehearing with Suggestion for Rehearing En Banc and Certification to the Nebraska Supreme Court." All relief requested is denied.

February 3, 1992

Order Entered at the Direction of the Court:

/s/ Michael E. Gens

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX G

NEBRASKA REVISED STATUTES 1989

(e) REQUESTS FOR CERTIFICATION OF LAW

24-219. Supreme Court; answer questions of law; when. The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or a United States District Court, when requested by the certifying court, if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of this state. Such request shall not obligate the Supreme Court to accept such request for certification and the Supreme Court may, in its absolute discretion, accept or reject such request for certification as it shall in each case determine.

24-220. Certification request; how invoked. Sections 24-219 to 24-225 may be invoked by a written request of any of the courts referred to in section 24-219 upon such court's own motion, or upon the motion to that court of any attorney involved.

24-221. Certification request; contents. A certification request shall set forth (1) the questions of law to be answered and (2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

24-222. Certification request; requirements; acceptance. The certification request shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all or any portion of the record before the certifying court to be filed with the certification order if, in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the questions. The Supreme Court shall determine whether to accept the certification request within sixty days following receipt by the court of the request. If the court fails to act on the request within sixty days of receipt, the request shall be deemed rejected.

24-223. Certification request; fees and costs. Fees and costs shall be the same as in civil appeals docketed with the Supreme Court.

24-224. Certification request; Supreme Court; duties. If a certification request made pursuant to section 24-222 is accepted by the Supreme Court, it shall promptly notify the requesting court in writing of such fact and the proceedings shall thereafter be as provided by the Supreme Court. The Supreme Court shall provide an expedited briefing and hearing process so that resolution of the accepted question may be promptly determined and justice not delayed.

24-225. Certification request; Supreme Court opinion; delivery. The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties.
